TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]19

GALVESTON WHARF COMPANY, R. J. CALDER, ET AL., APPELLANTS,

vs.

CITY OF GALVESTON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

FILED DECEMBER 20, 1922.

(28,014)

(28,014)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 657.

GALVESTON WHARF COMPANY, R. J. CALDER, ET AL., APPELLANTS,

vs.

CITY OF GALVESTON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1921.

1 *Precipe as to What Transcript Shall Contain.*

Filed Dec. 7, 1920.

In the United States District Court, Southern District of Texas, Galveston Division.

No. 41, Eq.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

To the Clerk of said Court:

The hereinafter indicated portions of the record in this cause are to be incorporated into the transcript of the record on appeal of said cause to the Supreme Court of the United States, to-wit:

(1) Complainant's Bill of Complaint and Order of the Court thereon.

(2) Order granting R. J. Calder, et al. leave to intervene.

(3) Intervening petition of R. J. Calder, et al.

(4) Original answer of defendants.

(5) Answer of defendants to intervening petition of R. J. Calder, et al.

(6) Order granting plaintiff leave to amend bill of complaint.

(7) Amendment of bill of complaint.

(8) Answer of defendants to amendments of Bill of Complaint.

(9) Order granting leave to plaintiff and intervenors to file supplemental complaint and replication.

(10) Plaintiff's supplemental complaint and replication.

(11) Intervenors supplemental complaint and replication.

(12) Agreement of Counsel relative to submission of cause, etc.

(13) Decree of dismissal for want of jurisdiction.

(14) Petition of plaintiff and intervenors for appeal.

2 (15) Assignments of Error.

(16) Order allowing appeal.

(17) Certificate to Supreme Court.

(18) Appeal bond and approval thereof.

(19) Citation on appeal and acceptance of service thereof and waiver of further notice.

(20) This precipe and acknowledgment of service thereof and waiver of further notice.

TERRY, CAVIN & MILLS,
Solicitors for Complainant and Intervenors, Appellants.

Service of the within and foregoing precipe is hereby accepted and acknowledged by and for the defendants and appellees in said cause and all further notice thereof is hereby waived this 7th day of December, 1920.

FRANK S. ANDERSON,
(City Atty.,)
McDONALD & WAYMAN,
Solicitors for Defendants, Appellees.

(Indorsements:) No. 41, Eq. Galveston Wharf Company v. City of Galveston et al. Precipe as to what transcript shall contain Filed Dec. 7, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

3 *Caption.*

In the District Court of the United States for the Southern District of Texas, Holding Sessions at Galveston.

In Equity.

No. 41.

GALVESTON WHARF COMPANY, a Corporation, Complainant, and R. J. Calder, C. McD. Robinson, Rebecca Trueheart, Feme Sole; Otto J. Heye, Betty Ballinger, Feme Sole; Emilie Kleberg, Widow; Kilburn Moore, B. D. Moore, John Adriance, Sr.; C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw, and George D. Morgan, Intervenors,

vs.

CITY OF GALVESTON, a Municipal Corporation, and H. O. Sappington, Mayor, President; J. C. Purcell, George E. Robinson, A. P. Norman, and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney, Defendants.

Be it remembered, That in the above entitled and numbered cause, lately pending in said Court, at Galveston, and in which a final decree was rendered at the Regular June Term thereof, 1920, to-wit: on November 26, 1920, the Honorable J. C. Hutcheson, Jr., United

States District Judge for the Southern District of Texas, presiding, the following proceedings were had and taken, in said Court, to-wit:

4 *Bill of Complaint and Order Thereon.*

Filed May 10, 1920.

In the United States District Court for the Southern District of Texas, Sitting at Galveston.

In Equity.

#41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

Bill of Complaint.

To the Honorable, the Judges of said Court:

Galveston Wharf Company, plaintiff, a corporation existing under the laws of the State of Texas, with its domicile in Galveston County, Texas, a citizen of said state, complaining of the City of Galveston, H. O. Sappington, J. C. Purcell, George E. Robinson, A. P. Norman, John H. Gernand and Frank S. Anderson, citizens of said state and residents of the County of Galveston, and their successors in office, as hereinafter stated, alleges:

That plaintiff is a corporation incorporated under an act of the Legislature of the State of Texas approved February 25th, 1854, entitled An Act to Incorporate the Galveston Wharf & Compress Company, and an Act Amendatory thereof, approved February 11th, 1860, entitled An Act to Incorporate the Galveston Wharf & Compress Company, by which last named act the name of plaintiff was changed to Galveston Wharf Company; that the City of Galveston is a municipal corporation existing under a special act of the Legislature, approved March 30th, 1903, entitled "An Act to amend "An Act to incorporate the City of Galveston, and to grant it a new Charter and to repeal all pre-existing Charters, approved April 18, 1901," and to repeal all laws in conflict herewith," and under acts amendatory thereof and a number of amendments were adopted under Section 5, Article II of the Constitution of Texas and the Acts of the Legislature of the State passed in pursuance thereof.

That H. O. Sappington is the Mayor President of said city, and the said Purcell, Robinson, Norman and Gernand are the
5 Commissioners thereof, being designated by the Charter as the Board of Commissioners of the City of Galveston, and the five constituting the legislative, executive and governing board

of said City, with Frank S. Anderson as the City Attorney of said City.

That controversies having arisen between the City of Galveston, which claimed the ownership of the lands in front of the City which were submerged or subject to the ebb and flow of the tide in Galveston Bay, called flats, under an Act of the Legislature of the State undertaking to grant title thereto, with wharf privileges of said city, and those claiming under a grant by the Republic of Texas to M. B. Menard of a league of land located on the Eastern end of Galveston Island, including all land upon which the City was then and now is located, the Supreme Court of the State in City of Galveston vs. Menard, City of Galveston vs Lufkin, 23 Texas, 349, decided that Menard had acquired title to said lands or flats and the wharf privileges in the channel of Galveston Bay in front of the same, but that the Galveston City Company, which had acquired title to the Menard grant had, by platting a part of said grant into blocks or lots showing streets thereon and selling blocks and lots with reference to such plat or map, and to a resolution adopted by it April 17th, 1838, explanatory thereof, dedicated to the public certain streets running through said flats to the channel of Galveston Bay, with wharf privileges at the end of such streets, but held that Lufkin had acquired title by limitation to that part of 25th Street or Bath Avenue North of the Street called Avenue A extending through such flats to the channel, and to the wharf privileges at the end thereof; that it is probable that the City had also lost title by limitation to several other streets or parts thereof between such Avenue A and the channel, concerning which there were no judgments or decrees establishing such titles.

There were other suits pending by the City of Galveston in-
6 volving other portions of such flats and the streets claimed to run through the same; the width of the streets running to the channel was 80 feet, with the exception of Bath Avenue or 25th Street, which was 120 feet, while the intervening spaces between such streets were 300 feet, so that the City, having lost title to Bath Avenue and probably to other streets by limitation, the utmost of its claim under the decision in City vs. Menard, was to less than one-fifth of the area North of Avenue A between Ninth and Forty-first Streets; and among others, a suit against plaintiff, in which suit a compromise or agreed decree was entered in the District Court of Brazoria County, said state, the first day of April, 1869, which, while so entered as a decree was in fact a contract, as appears on the face thereof, between the City of Galveston, the official title whereof was at that time "Mayor, Aldermen and Inhabitants of the City of Galveston"; that by said decree it was provided that the then capital stock of plaintiff consisting of 12,444 shares, at $100.00 each, be increased the full one-half thereof, that is, by 6,222 shares, which said 6,222 shares should be the property of the Mayor, Aldermen and Inhabitants of the City of Galveston, and that the same should stand and remain on the books of plaintiff as the property of said Mayor, Aldermen and Inhabitants of the City of Galveston, and that an equal undivided one-third of the property of plaintiff to be consolidated and vested in it shall be owned by said City and represented by

said stock, and that the said stock and the rights and interest therein and in said property of said Mayor, Aldermen and Inhabitan s of the City of Galveston shall be in trust for the present and future inhabitants of the City of Galveston, and all and every part thereof shall be inalienable and not subject to conveyance, assignment, transfer, pledge or mortgage, in any other manner than by a four-fifths vote of all of the qualified voters of *of* said City in favor of
7 some clear and specific proposition therefor, and that the dividends and net earnings of said stock shall be regularly paid to said Mayor, Aldermen and Inhabitants of the City of Galveston to be disbursed and expended for the public good and benefit of said present and future inhabitan s of said City, and that said City shall be represented by three directors, one of whom shall be the Mayor, another shall be an Alderman of said city and the third shall be either an Alderman or a citizen of said City, both to be elected by the common council of said Ci y, and that the other six directors of plaintiff shall be elected by the remaining stockholders exclusive of the stock of the City. It was further provided that in all stockholders' meetings of plaintiff no measure shall be adopted and no vote, act, or proceeding shall be valid unless by a vote of three-fourths of all of the stock of plaintiff, exclusive of the stock of the City. It was then provided that all of the property rights and claims of every kind and description (except certain specified lots and property) of plaintiff, and also all of the right, title, interest and claim of every kind and description whatsoever of the said Mayor, Aldermen and Inhabitants of the City of Galves on in and to all of the land and ground extending from the shore or ordinary high water mark of the Island of Galveston, to the channel of the Bay from and including the street shown on the map as Ninth Street on the East, to and including the street known as Thirty-first Street on the West, including all the ground known as the flats wi hin said limits, and all rights, capacity, powers and claims of said Mayor, Aldermen and Inhabitants to build and erect wharves and take and receive wharfage therefor at the end of the streets now or hereafter running or extending to the channel, be vested in the plaintiff (there called Galveston Consolidated Wharf Company) and be henceforth the corporate property, right and title of the said Galveston Wharf Company, and owned, held, possessed, controlled, used and ad-
8 ministered by said company—all the said united and consolidated property righ s and claims being represented by such aggregate of $1,866,600.00 stock, the original two-thirds thereof held by the present s ockholders and one-third by said City, in trust as aforesaid. It was then sta ed that the rights of the City in certain parts of said flats intended to become the future property of plaintiff, then in litigation and controversy between said City and the Galveston City Company, were denied by the said City Company and other parties, and also in controversy between said City and A. H. Bean and others, in suit No. 2437, and that the settlement and arrangement should have no constructive operation or effect whatever to prevent the City from maintaining and continuing all suits now pending, or from instituting other suits necessary or proper to

recover and enforce the right and claim of said City to all of said flats, which in adverse right is or shall be held and claimed by any and all other parties against City or against this plaintiff, there called "The Company herein united and consolidated", and recovery by the City in all such suits and all future title to any part of the said flats in front of the City within the aforesaid limits hereafter acquired in any manner by either party, to inure to the common benefit of the parties to the decree, and of the good faith, fulfillment and execution of this compromise. It was then specified that certain property of the plaintiff to be excepted under the terms of said decree should be withdrawn and conveyed by plaintiff to a trustee or trustees to be held and disposed of for the use and benefit of the stockholders of plaintiff prior to this compromise. It was then stated: "it is further the agreement and intention of the parties that this settlement shall, if practicable, result in and secure the final settlement of all controversy, and prevent future controversy in regard to all the wharf privileges in front of the City of Galveston, and that the whole of said wharf privileges shall be united and
9 consolidated in the present parties hereto."

It was provided that plaintiff should pay all expenses incident to the litigation hereby compromised, and that plaintiff should have the right to issue additional stock to dispose of same to raise the necessary funds to pay off such expenses, and to do the same after the issuance to the City of its 6,222 shares of stock. A copy of said decree or contract of April 1, 1869, is attached hereto as a part hereof, marked Exhibit A.

Plaintiff issued 100 shares of its stock to the attorneys for the City in said litigation, as part payment of their fees. Plaintiff's stockholders, on the 8th day of May, 1869, unanimously adopted a resolution approving an agreement made by the Board of Directors to purchase for 5,500 shares of plaintiff's stock property of the Houston & Galveston Wharf & Press Company extending from the Bay front or said street called Avenue A to the channel between Thirty-First and Forty-First Streets. The 6,222 shares of stock of the City was voted for said resolution by its Mayor, J. A. McKee. At the same meeting another resolution was unanimously adopted by plaintiff's stockholders, the City's 6,222 shares voting therefor by its said Mayor, which authorized the directors of plaintiff to purchase from the Galveston City Company the property North of said Avenue A between Tenth and Fourteenth Streets to the channel of the Bay, and also the North one-half of Block 682 and the property North thereof to the channel. On the 13th day of May, 1869, the Houston & Galveston Wharf & Press Company conveyed by deed to plaintiff its property aforesaid and received in payment therefor 5,500 shares of the stock of plaintiff, which deed conveyed to plaintiff all of the land in the area before described, including the land and ground which would be occupied by streets if there were any streets extending through or into such area to the channel or otherwise and
10 conveyed all of the wharf privileges on the channel in front of such area. On the 26th day of May, 1869, Galveston City

Company conveyed by deed to plaintiff the land between the North half of Block 682 in the channel, and received therefor 2,000 shares of the capital stock of plaintiff. On the 3rd of November, 1869, plaintiff intervened in a suit pending in the District Court of Brazoria County, in which the Galveston City Company was plaintiff and the City of Galveston was defendant, and thereupon a decree was entered in said cause, vesting title in the Galveston City Company to North half of Block 682, and vesting title in plaintiff to the property between said block and the channel, and it was adjudged that the City of Galveston take nothing. By an act of the Legislature of the State of Texas, approved June 23rd, 1870, said compromise decree of April 1st, 1869, and said sale by the Houston and Galveston Wharf & Press Company to plaintiff, and said decree of November 3rd, 1869, were in all respects validated, ratified and confirmed, a copy of which Act is hereto annexed as a part hereof and marked Exhibit B.

That the Mayor, Aldermen and Inhabitants of the City of Galveston did not, in May, 1869, or at any time thereafter, request or demand the issuance to them or to the City of any additional shares of stock of the plaintiff, and from May, 1869, to this time the City has been paid dividends on its stock, on approximately one-fourth of total stock issued, at the same rate and to the same extent only that dividends have been paid on the other shares of stock of plaintiff. Before declaring dividends there were deducted expenses of operation, taxes, interest on bonds, and other indebtedness, amounts placed in sinking fund for retiring bonds, expenditures for improvements, amounts necessary to pay indebtedness and all other legitimate charges or expenses.

That continuously after May, 1869, and for more than ten years plaintiff had peaceful and adverse possession of said land purchased from the Houston and Galveston Wharf & Press Company,
11 using and enjoying the same, having wharves, piers, railroad tracks and other improvements thereon. That in Galveston Wharf Company vs. City of Galveston, 63 Texas, page 14, on December 19th, 1884, the Supreme Court of Texas decided that the interest in the property owned by the Mayor, Aldermen and Inhabitants of the City was not subject to taxation, and that before paying dividends the plaintiff could deduct from the earnings the taxes payable upon the remainder of the property. Plaintiff construed this decision as not applying to the property West of Thirty-First Street, persistently claiming that the City had no interest therein, except as a stockholder. It continued to pay taxes on all of the property West of Thirty-First Street from 1869 to and including 1891, after which, apparently by a clerical error, in 1892, an undivided two-thirds of such property was assessed for taxes. On July 8th, 1886, the City Attorney rendered an opinion to the City that the City, or the inhabitants thereof, had no interest except as stockholders to said property West of Thirty-First Street, except that he claimed that the City owned streets extending through the same and the wharf privileges at the end of such streets, whereupon, on July 8th, 1886, the City Council adopted a resolution instructing the assessor to

assess the entire property West of Thirty-First Street, except the ground claimed as streets. In August, 1889, special counsel, employed by the city to investigate its interest or that of its inhabitants in the property of plaintiff, rendered to the City opinions in effect that all stock issued to plaintiff had been lawfully issued, that plaintiff owned an undivided interest in the entire property, including that West of Thirty-First Street, which was represented by 6,222 shares of stock on which the City or its inhabitants were entitled to dividends, the same as upon the other stock of plaintiff, except that he thought that the taxes payable on two-thirds of the property (he considering that one-third of the entire property was exempt from taxation) should not be deducted from the earnings until
12 after the dividends payable on the City's stock had been computed, or, in other words, that all such taxes should be chargeable to and paid by the private stockholders, and stated that he did not regard the decision on this point aforesaid, in the Supreme Court, conclusive, and that if necessary the question should be again presented to the courts for a decision. On March 15th, 1904, plaintiff, in a written communication to the City, offered to pay taxes on all of the property West of Thirty-First Street, again claiming that the City had no interest therein, except as a stockholder.

On March 9th, 1905, the City, acting by its Mayor President and its four commissioners, subject to the approval of the Legislature of the State, executed an agreement with plaintiff, a copy whereof is hereto attached as a part hereof, marked Exhibit C, which agreement was in all things ratified, approved and confirmed by an amendment by an Act of the Legislature of Texas to the Charter of the City, which took effect April 15th, 1905, by which agreement of March 9th, 1905, plaintiff waived its claim for payment of taxes, with interest thereon, amounting to about $57,000.00, and agreed to pay the City $60,000.00 for drainage purposes, which was done, gave the City certain drainage rights through its property, admitted that the City owned an undivided one-third interest in the property situated between Thirty-First and Forty-First Streets, the same as in the property between Ninth and Thirty-First Streets, and it was agreed that said one-third of said Wharf Company's entire property owned by said City of Galveston as aforesaid shall be exempt from taxation, and said city shall be entitled to and shall receive dividends from said Galveston Wharf Company in the same manner in which such dividends have heretofore been paid; that is, said city shall be entitled to and shall receive upon each of its sixty-two hundred and twenty-two shares (6,222) of stock the same amount of dividends as shall be paid by said Galveston
13 Wharf Company on any other share of capital stock of said Wharf Company, all fixed charges and legitimate expenses of operating, maintaining repairing and improving the entire property in the same manner as heretofore, including all taxes, interest and sinking funds that may be due or become due by said Wharf Company, to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest and sinking funds that may be due or become due by said Wharf Company

to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest, sinking funds and dividends being hereby admitted by said city to be correct; and said Galveston Wharf Company shall hold the title, subject to said city's one-third interest therein, to said entire property included in the territory north of Avenue A and between said Ninth and Forty-first Streets in the City of Galveston, including what would be the prolongations of all streets if opened through said property; and the control and management of the whole of said Wharf Company's property including said city's one-third interest therein to remain in said Wharf Company in the same manner as fixed by the before mentioned decree of the District Court of Brazoria County, Texas, and said decree and all the terms and provisions thereof shall remain in full force and undisturbed except insofar as the same may be changed by this contract and agreement.

That up to this time said agreement of March 9th, 1905, has been fully performed. That by an act of the Legislature, approved August 4th, 1870, the Legislature authorized plaintiff to construct and operate railroads a copy of which Act is hereto attached as a part hereof marked Exhibit D.

That on the 16th day of March, 1920, there were published in the Galveston Tribune, a daily newspaper circulating in said city, certain amendments proposed to be submitted by the Board of Commissioners of the City to the voters thereof under the con-
14 stitution and laws of Texas, permitting cities of more than 5,000 inhabitants to so amend their charters. On March 20th, 1920, said Board of Commissioners adopted a resolution calling an election on the 4th day of May, 1920, for the qualified voters of the city to vote on such amendments, on which date an election was held, upon the returns of which it appears that about 5,709 votes were cast and that the 7th, 8th, 9th and 25th propositions submitted to the voters were adopted by majorities of about 240, which propositions are as follows:

Seventh Proposition.

Shall the existing charter of the City of Galveston be amended by adding thereto a new section, to be numbered No. 100 and to read and be as follows to wit:

Section 100. Ownership of Public Utilities, etc.—The City of Galveston shall have the power to acquire by purchase, lease, condemnation or otherwise and to buy, own, construct, establish, maintain, equip, regulate and operate, within or without the city limits and when so acquired, to lease sell, convey, assign, transfer, pledge, mortgage and encumber the same or any part thereof, a system or systems of gas or electric lighting plant dock and wharf railway terminals, bridges, drawbridges, docks, wharves, ferries, ferry landings, loading and unloading devices and shipping facilities or any other public service or public utility and to demand and receive

compensation for service furnished for private purposes or otherwise and to appropriate private and public property, within or without the city limits for such purpose, and to exercise whenever, and as often as, the Board of Commissioners shall deem it necessary, the right of eminent domain, for the appropriation of public and private lands, property, rights of way, or anything whatsoever that may be proper and necessary to efficiently carry out said objects, including the right, when so expressed, to take the fee in the lands, rights of way or property so condemned, which said powers shall include the power to condemn the whole or any part of the property of any person, firm or corporation, now conducting any such business, plant or system, including the property, real, personal and mixed, owned jointly by the Galveston Wharf Company and the City of Galveston, and in which said property the City of Galveston owns an undivided one-third interest, for the purpose of acquiring, establishing, constructing, owning, operating, equipping and maintaining any such public service or public utility, and for the purpose of distributing such service throughout the city or any portion thereof; provided, that in all cases where the city seeks to e ercise the power of eminent domain as herein provided, it shall be controlled, as nearly as practicable, by the law governing the condemnation of property of railroad corporations in this state, the city taking the position of the railroad corporation in any such case; provided, that no lease, sale, conveyance, assignment, transfer, pledge, mortgage or encumbrance, of any public service or public utility hereinbefore mentioned, or any part thereof, shall be made under this section unless the same shall first have been submitted to, and authorized by, the vote of a majority of the qualified voters of said city voting at an election to be held exclusively for that purpose.

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Eighth Proposition.

Shall the existing charter of the City of Galveston be amended by adding thereto a new section, to be numbered No. 101, and to read and be as follows, to-wit:

Section 101. Whenever the City of Galveston may determine to purchase or acquire any public service or public utility, the city may obtain funds for the purpose of purchasing or acquiring the same and paying the compensation therefor, by issuing bonds, notes or other evidence of indebtedness of said city, and shall secure the same by fixing a lien upon the said property constituting the said public service or public utility so acquired by condemnation, purchase or otherwise, and said security shall apply alone to the said property so, pledged, and shall never be reckoned in determining the power of said city to issue bonds for any purpose authorized by law, and no judgment shall ever be rendered against the city upon any such note, bond or other evidence of indebtedness, requiring the city to pay any specified sum of money, but said judgment shall be merely one of foreclosure,

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divesting and depriving the city of possession of the property so purchased and condemned, but not paid for, in which event the city shall forfeit and lose only the payments theretofore made without liability or judgment in any sum for the unpaid purchase price; provided, that the issuance of said bonds, notes or other evidence of indebtedness, and the management and control of such encumbered property shall be issued and governed, so far as applicable, in conformity with the provisions of Articles 772*b*, 772*c*, 772*d*, 772*e* and 772*f* of Vernon's Sayles' Texas Civil Statutes of the State of Texas, 1914, and the acts amendatory thereof and supplemental thereto; and provided, further, that any such bonds, notes or other evidence of indebtedness, issued as aforesaid, shall be exempt from taxation, and provided, further, that no purchase or expenditure shall be made under this section unless the same shall first have been submitted by the Board of Commissioners to a vote of the qualified voters of said city at an election to be held for that purpose.

Ninth Proposition.

Shall the existing charter of the City of Galveston be amended by adding thereto a new section to be numbered No. 102, and to read and be as follows, to-wit:

Section 102. In the event of the acquisition by the City of Galveston, by purchase or condemnation, of the property owned jointly by the City of Galveston and the Galveston Wharf Company, the City of Galveston shall, and it is hereby, authorized to, surrender to the Galveston Wharf Company, the stock of said corporation
17 now owned and held by said city representing its interest in said property, and said city shall retain out of the purchase price of said property, or any part thereof, whether acquired by purchase or condemnation, its one-third interest therein, and the Galveston Wharf Company and the City of Galveston shall adjust any and all rights relating to the payment of taxes, dividends, interest, bonds, sinking funds or other legal liabilities incurred by said Galveston Wharf Company in the management of said property, and any sum or sums of money found to be legally owing by the City of Galveston, by reason of the matters aforesaid, shall be paid out of such proceeds, and said city is also hereby authorized to invest the residue of such proceeds in the property so acquired, or expend all, or any part of the residue of such proceeds for the purpose of (*a*) paying and discharging its bonded indebtedness, or (*b*) raising the grade, building seawalls and breakwaters, and doing any and all other kinds of protective works in said city, either by itself, or in conjunction with either the State of Texas, County of Galveston, or the government of the United States, or (*c*) other public purposes and improvements, as may be determined by a majority of the qualified voters of said city voting at an election called for such purpose.

Twenty-fifth Proposition.

Shall the existing charter of the City of Galveston be amended by adding thereto a new Section to be numbered No. 118, to read and be as follows, to-wit:

Section 118. The City of Galveston shall have the power, and it is hereby authorized, to compel a partition and division of the property, real, personal and mixed, owned by the City of Galveston and the Galveston Wharf Company jointly, and to sell, convey, assign, transfer, pledge, mortgage or encumber the same, or any part
18 thereof, when authorized by a majority of the qualified voters of said city voting at a special election called for such purpose, in favor of some clear and specific proposition therefor, and provided further, that the Board of Commissioners are authorized to institute and prosecute a suit for the partition of such property, as provided by the statutes of the State of Texas, and from time to time submit to the qualified voters of said city, at a special election called for the purpose, a proposition for the lease, sale, conveyance, assignment, transfer, pledge, mortgage and encumbrance of the whole or any part of the property hereinbefore mentioned, and provided further, that the City of Galveston shall have the power, and it is hereby authorized to expend all, or any part of, the proceeds derived from the lease, sale or encumbrance, of said property or any part thereof, for the purpose of (*a*) paying and discharging its bonded indebtedness, or (*b*) raising the grade, building seawalls and breakwaters, and doing any and all other kinds of protective works in said city, either by itself, or in conjunction with either the State of Texas, County of Galveston or the government of the United States, or other public purposes or improvements, as may be determined by a majority of the qualified voters of said city voting at an election called for such purpose as hereinbefore provided; provided further, that in the event of a partition of said property, the City of Galveston is hereby authorized and empowered to surrender to the Galveston Wharf Company, the stock in said corporation, now owned and held by it as representing the undivided one-third interest of said city in said property.

That said Board of Commissioners have or will declare said amendments adopted, forming parts of the charter of said City. That plaintiff owns and holds the title to all the property hereinbefore described, vested in it by said decree of April 1st, 1869, by the other facts hereinbefore alleged, including said agreement of March 9th, 1905, and so owns and holds one-third thereof in trust for the bene-
fit of the present and future inhabitants of the City of Galves-
19 ton to pay over the dividends in proportion to the shares of stock representing the same, to the said City to be by it used for the benefits of such present and future inhabitants of Galveston, which trust, according to the express terms thereof, cannot be terminated or discharged, except by a sale of said one-third interest or the stock representing the same upon a vote of four-fifths of all of the

qualified voters of said city in favor of some clear and specific proposition therefor, there being slight probability that such a vote will ever be had, and that subject to such trust plaintiff has the absolute ownership, control and dominion over all of said property perpetually, and that the City of Galveston agreed in said decree of April 1st, 1869, and said contract of March 9th, 1905, which agreements were approved and ratified by the Legislature of the State, that plaintiff, subject to such trust, should own, hold, use, manage and enjoy said property, and that the attempted condemnation of said property or any part thereof under said seventh proposition, or attempted partition thereof under the said twenty-fifth proposition and attempting to sell one-third of said property or any part thereof, under said proposition or any of them, upon a majority only of the voters of said city, would impair the obligation of said contracts of April 1st, 1869 and March 9th, 1905, and deprive plaintiff of its property and property rights, of the right to control and manage all of said property, deprive it of its trust, without due process of law, contrary to the constitution of the United States, and same would so deprive the present and future inhabitants of said city of their property, property rights, cestuis que trust, of one-third of said property, and the stock representing the same, for that under said contracts the interest of said inhabitants can be disposed of only upon a vote of four-fifths of the qualified voters of the city, in favor of some clear and specific proposition therefor. That the said City of Galveston, having attempted to violate its duty in the premises to such inhabitants, plaintiff, as their trustee is entitled to represent and protect their interest in said property.

That plaintiff has not within forty years paid a dividend on stock exceeding 6% per annum, and its dividends have averaged only 4.358%, that large sums of the earnings of said property which might have been applied in the payment of dividends and which, if so applied would not have caused the dividends to have averaged more than reasonable dividends or returns on the value of the property have been expended in the permanent improvement of the property, at least the sum of $2,592,815.77 having been so expended, and if said amounts had been expended in dividends the city would have received approximately one-fourth thereof, and the private stockholders of plaintiff, the other three-fourths, while the same, having been expended in improvements beneficial to the interest of the present and future inhabitants of said city in said property, said city has received the benefit of one-third instead of one-fourth of such earnings. That although the interest of said inhabitants in said property has not been subject to mortgage, except on a vote of four-fifths of the voters therefor, which has not been had, plaintiff has borrowed large sums of money and mortgaged its property, such mortgages being binding only on the interest of the private stockholders, it now has outstanding bonds in the sum of $3,000,000.00 secured by such mortgages, and has accumulated a sinking fund in the sum of $902,000.00 for payment of such bonds, leaving the sum of $2,198,000.00 thereof for which there is no cash for the payment thereof. That if the right to partition such property did exist, in

the partition thereof the equities above stated of the private stockholders should be provided for by requiring the city or the inhabitants thereof in some form to compensate the plaintiff and stockholders for the expenditures so made, as aforesaid, in the
21 improvement and corresponding increase in the value or the one-third of the property, which might be partitioned to the city or the inhabitants thereof, but that said proposition 25 makes no provision whatever for adjusting such equities, and that the same cannot be adjusted in a court of law. That all of said property has been improved, there being wharves, piers, warehouses, grain elevators, railroad tracks and other improvements thereon, from Tenth to Forty-First Streets, for use as an entirety, and that said property cannot be equitably partitioned in kind, so as to set apart one-third thereof with the improvements thereon of equal value to the other two-thirds; that said property cannot be so partitioned without injuring and damaging the value and utility thereof, all of which are now devoted to public use, and have been so devoted for many years, to a very large extent, and to the equivalent of a large sum of money. That now and for a number of years there have passed over the railroad tracks, wharves and piers of plaintiff very large tonnage of interstate and foreign commerce and some tonnage of state commerce, and that such will continue in the future. That the service, rates and charges of plaintiff as to such interstate and foreign commerce are subject to the regulation and control of the Interstate Commerce Commission, and that such intrastate commerce is subject to the regulations and control of the Railroad Commission of Texas. Wherefore, a partition of said property would greatly impair and depreciate the value thereof as a whole or of such value of one-third thereof, or such value of two-thirds thereof.

That while said proposition 25 purports to authorize a partition of said property, it is evident from a reading thereof that the purpose thereof would be a sale of one-third of such property, authorized only by a majority vote of the voters of said city, which, as afore-
22 said, would impair the obligation of said contracts and rights of plaintiff, as owner and trustee for its own stockholders, as well as the present and future inhabitants of said city. That said proposition relies on the Statutes of Texas for the right to partition. Such statutes were passed since said decree or contract of 1869, and if held applicable hereto would impair the obligation of the contract thereof contrary to the Constitution of the United States. That insofar as defendants rely in the seventh proposition on any statutes of Texas authorizing the city to condemn the said property or any part thereof, such statutes, if held applicable, were passed since the decree of 1869 and the contract of March 9th, 1905, and would impair the obligation of such contracts and would deprive, if enforced, plaintiff, of its property and property rights as owner and trustee without due process of law. That said seventh proposition undertakes to confer authority on the city to condemn property claimed to be owned by it, which is not authorized by any court procedure or other law, state or federal.

That the publication of said amendments in March, 1920, and the

agitation for the adoption thereof has impaired the value of the shares of its stockholders, some of which sold in January, 1920, for $85.00 per share, and since said publication and agitation have sold for $70.00 per share. That said amendments as purported parts of the charter of the City would be a cloud on the title of plaintiff to said property, depreciate the value thereof, depreciate the market value of the stock of its stockholders, damage and injure the credit of plaintiff, retard the development and improvement of said property, injure the beneficial interest of the present and future inhabitants of said city, of which plaintiff is trustee, be a constant threat and menace to the plaintiff in the ownership, enjoyment, holding and management of said property, and that unless restrained or enjoined, defendants will attempt to partition said property or condemn the
23 same, or both, which cannot be done without great and irreparable damage and injury to plaintiff and the beneficiaries, of its trust.

The City owns Pelican Island fronting immediately on the deep sea channel of Galveston Bay, much larger in area than the property held by plaintiff, much of which is at an elevation above storm waters, which is capable of improvements, docks, wharves and terminals. There is a large area on the Eastern end of Galveston Island fronting immediately on said deep sea channel owned by private parties larger in area than the property held by plaintiff, which can be improved by such wharves, docks and terminal facilities, and which will be protected by a seawall now under construction by the United States Government, and which will be completed in a few months. There are large areas of property susceptible of improvement for such purposes now unimproved, westward of the property held by plaintiff. Hence, if the city wishes to inaugurate municipal wharves it has ample opportunity to do so without undertaking to appropriate the property held by plaintiff, or any part thereof. That the city has received in dividends in trust for its inhabitants $742,000 in excess of the additional amount of taxes which it would have received had taxes been paid on all of the property held by plaintiffs. That without cost to the city or contribution by it of one cent there have been expended in additions and improvements of the property since April 1st, 1869, the sum of $2,592,815.77. That under such circumstances it would be contrary to equity and good conscience to permit the City to condemn or appropriate the property held by plaintiff, or any part thereof.

That plaintiff now is and has been since, 1869, in possession of all of the property hereinbefore described. That this is a suit
24 arising under the Constitution of the United States in which the matter in controversy exceeds the sum or value of $3,000. In consideration whereof, without remedy under the rules of common law, to have adequate relief only in a court of equity, plaintiff prays that writ of subpœna be issued to defendants commanding them and each of them to appear in this court at some certain dates to be named therein, to answer in the premises, answer under oath being expressly waived, and that upon final hearing hereof said charter amendments insofar as they affect or attempt to affect the

plaintiff, the property hereinbefore described and the ownership thereof by plaintiff, be cancelled and decreed to be void, and that defendant City, and the other defendants and each of them, and their successors in office be perpetually enjoined from attempting to enforce said charter amendments by filing or prosecuting suit or suits, proceeding or proceedings for partition, condemnation, or in any other manner whatsoever against plaintiff or against the property hereinbefore described or any part thereof, and that the City be perpetually enjoined from attempting to commit a breach of the trust imposed on it by the decree of April 1st, 1869, and the Act of the Legislature confirming the same, and accepted by it, by attempting in any manner to interfere with plaintiff in the possession, control, ownership and operation of the property herein described, or attempting to acquire the said property or any part thereof, or to partition the same, or attempt to dispose of same or any part thereof, or to interfere with the same in any way, except when authorized to do so by a vote of four-fifths of the qualified voters of said city in favor of some clear and specific proposition. That pending final hearing hereof a temporary injunction issue enjoining said defendants from doing or attempting to do any of the acts aforesaid, and pending a hearing for such injunction, a restraining order issue restraining said defendants and each of them from taking or attempting any action under said charter amendments, against plaintiff or said property or any part thereof, by filing or attempting to file any such suit or suits, proceeding or proceedings, for partition, condemnation or otherwise, and that plaintiff have a decree of such further and other relief as the case may require, as well as for all costs.

TERRY, CAVIN & MILLS,
Attorneys for Plaintiff.

STATE OF TEXAS,
County of Galveston:

John Sealy, being first duly sworn, deposes and says that he is President of the Galveston Wharf Company, Plaintiff, and has read the foregoing Bill of Complaint and knows the contents thereof, and that the matters therein stated are true.

JOHN SEALY.

Subscribed and sworn to before me this 7th day of May, 1920.
[SEAL.]
W. D. BAGGETT,
Notary Public, Galveston County, Texas.

In Chambers.

Houston, Texas, May 8, 1920.

Upon presentation of the foregoing bill in Chambers, it is ordered that upon the filing of said bill the same be set for hearing on the application for temporary injunction before me in the Court House

at Galveston for Monday the 7th day of June, 1920, and the Clerk is directed to cause the defendants to be notified of the time and place of said hearing.

J. C. HUTCHESON, JR.,
Judge.

26 EXHIBIT A.

Decree of Compromise.

THE MAYOR, ALDERMEN, and INHABITANTS OF THE CITY OF GALVESTON,

versus

THE GALVESTON WHARF COMPANY.

This day the above cause came on to be heard, and leave is granted to both parties to amend their pleadings, and amendments were filed, and thereupon the parties announced themselves ready for trial, and waived a jury and submitted this cause to the Court, and further announced that the said parties, plaintiff and defendant, had agreed on the terms of a final settlement and compromise between said parties, and that the same should be entered as the decree and judgment of the Court herein, all errors and exceptions thereto being waived, and the terms of said judgment and decree appearing to the Court to be reasonable and fair and for the public interests involved: Thereupon, it is considered, ordered, adjudged and decreed by the Court, that the present capital stock of the Galveston Wharf Company, consisting of twelve thousand four hundred and forty four shares of stock of one hundred dollars per share, amounting in the aggregate to one million two hundred and forty-four thousand four hundred dollars, shall be increased the full one-half thereof, viz: by six thousand two hundred and twenty-two shares of one hundred dollars each, amounting to the sum of six hundred and twenty-two thousand two hundred dollars, which said stock of said sum of six hundred and twenty-two thousand two hundred dollars shall be the property of the Mayor, Aldermen and Inhabitants of the City of Galveston, and the same shall stand and remain on the books of said company as the property of said Mayor, Aldermen and Inhabitants of the City of Galveston, and the equal, undivided one-third of the property of said Company, to be consolidated and vested in it by this decree, shall be owned by said City and represented by its said stock, and the said stock,
27 and the rights and interests therein and in said property of said Mayor, Aldermen and Inhabitants of the City of Galveston, shall be in trust for the present and future inhabitants of the City of Galveston, and all and every part thereof shall be inalienable and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever, in any other manner than by the vote of four-fifths of all the qualified voters of said City in favor of some clear and specific proposition therefor.

The dividends and net earnings of said stock shall be regularly paid to said Mayor, Alderman and inhabitants of the City of Galveston, to be disbursed and expended for the public good and benefit of said present and future inhabitants of said City; and that the said plaintiffs shall be represented by three Directors in the Board of Directors of said Company, one of whom shall be the Mayor of said City, who shall be one of the Committee on Finance; another shall be an Alderman of said City, and the third shall be either an Alderman or a citizen of said City, both to be elected by the Common Council of said City. The other six Directors of said Company to be elected by the remaining stockholders of said Company exclusive of the stock of said City. And it is further expressly understood and agreed between the parties, and it is so ordered, adjudged and decreed, that in all the stockholders' meetings of said Company no measure shall be adopted, and no vote, act or proceeding shall be valid unless by a vote of three-fourths of all the stock of said Company exclusive of the said stock of the plaintiff. In consideration of all which, it is further agreed between the parties, and is now considered, ordered, adjudged and decreed by the Court that all the property, rights and claims of every kind and description (except certain lots and property hereinafter specified), of the said Galveston Wharf Company, and also all the right, title, interest and claim of every kind and description whatsoever, of the said Mayor,
28 Aldermen and Inhabitants of the City of Galveston, in and to all the land and ground extending from the shore or ordinary high-water mark of the Island of Galveston to the channel of the bay or harbor, from and including the street known on the map and plan of said city of Galveston as Ninth street, on the east, to and including the street known as Thirty-First street on the west, including all the ground known as the Flats within said limits, and also all rights, capacity, powers and claims of said plaintiffs to build and erect wharves, and take and receive wharfage therefor, at the end of streets now or hereafter running or extending to said channel, be and the same are hereby vested in the said Galveston Consolidated Wharf Company, and to be henceforth the corporate property, right and title of the said Galveston Wharf Company, and owned, held, possessed, controlled, used and administered by said Company—all the said united and consolidated property, rights, and claims being represented by said aggregate of one million eight hundred and sixty-six thousand six hundred dollars—the original two-thirds thereof held by the present stockholders and one-third by the said plaintiff in trust as aforesaid. But it is further expressly provided, declared and understood, by the parties, and is considered, ordered, adjudged and decreed by the Court, that the rights of said plaintiff in and to certain parts of said Flats intended hereby to become the future property of said Company, are now in litigation and controversy between said plaintiff and the Galveston City Company, or are denied by the said City Company and other parties, and also in controversy between plaintiff and A. H. Bean and others, in suit No. 2437, on the docket of this Court; and that this settle-

ment and arrangement shall have no constructive operation or effect whatever to prevent the plaintiff herein from maintaining and continuing all the suits now pending or from instituting and prosecuting any and all other suits necessary or proper to recover
29 and enforce the right and claim of said plaintiff to all of said "Flats" or ground to which any adverse right is or shall be held or claimed by any and all other parties against said plaintiff, or against the Company herein united and consolidated; the recovery by the plaintiff in all suits now pending or hereafter brought, and all future title to any part of the said "Flats" in front of City of Galveston within the aforesaid limits, hereafter acquired in any manner by either party, to inure to the common benefit of the parties herein, and to the good faith, fulfillment and execution of this compromise and settlement.

It is further agreed between the parties, and is considered, ordered, adiudged and decreed by the Court, that the following property of said defendant, viz: all the lots, blocks and land now owned, held or claimed by said defendant, south of Avenue A. on the map of plan of said city; also, all the lots now owned or held by said Company in the south half of the following Blocks, viz: six lots in 734, three lots in 735, two lots in 736, two lots in 737; also, all the stocks in other companies held by said defendant; all the accounts, claims, debts and liabilities now due to or heretofore contracted to said defendant, and all its personal property not forming part of the wharves, shall not be included in the future property and rights to be held and owned by said Company jointly for plaintiffs and defendants as aforesaid, but that the same shall be withdrawn from said Company and forthwith conveyed by said Company to a trustee or trustees to be named by it, and to be held or disposed of for the use and benefit of the stockholders of said Company prior to this compromise, as the holders of the original stock of said Company may direct. It is further the agreement and intention of the parties that this settlement shall, if practicable, result in and secure the final settlemen of all controversy, and prevent future controversy in
30 regard to all the wharf privileges in front of the City of Galveston, and that the whole of said wharf privileges shall be united and consolidated in the present parties hereto.

It is further agreed, considered. ordered, adjudged and decreed by the Court, that as the Galveston Wharf Company has assumed to pay all the expenses incident to the litigation hereby compromised they shall have the right to issue additional stock at their discretion, which may be held, pledged or paid out in order to raise the necessary funds to pay all expenses incurred in said litigation, or issue bonds or use the income and earnings of the said Wharf Company; to do the same after the issuance to the City of Galveston of the six thousand two hundred and twenty-two shares of stock, as aforesaid.

It is further agreed by the parties, and is ordered, adiudged and decreed by the Court, that the defendant shall pay all the costs in this suit incurred.

J. B. McFARLAND,
Judge of the First Judicial District of Texas.

THE STATE OF TEXAS,
County of Brazoria:

I, S. L. S. Ballowe, Clerk of the District Court within and for the said County of Brazoria, certify that, on this, the first day of April, A. D. 1869, the preceding decree was duly entered and recorded in the District Court of Brazoria County, and that the said preceding seven pages in all respects agree with the records of the said District Court, duly entered in the suit of the Mayor, Aldermen and Inhabitants of the City of Galveston against the Galveston Wharf Company.

Given under my hand and the seal of the said District Court of Brazoria County, this first day of April, A. D. 1869.

[L. S.] S. L. S. BALLOWE,
Clerk D. C. B. C.,
By G. WESTERVELT,
Deputy.

31 EXHIBIT B.

Confirmation of Compromise.

An Act to Confirm the Compromises and Settlements Between the Corporation of the City of Galveston, the Galveston City Company, the Houston and Galveston Wharf and Press Company, and the Galveston Wharf Company.

Whereas, On the 8th day of December, 1851, an act was passed by the Legislature entitled "An Act granting certain powers to the Corporation of Galveston City," and on the 16th day of February, 1852, an act was passed entitled: "An Act supplementary to an Act granting certain powers to the Corporation of Galveston City," approved December 8th, 1851; and, whereas, litigation in regard to the property known as the Flats, within the corporate limits of said City, existed for many years, retarding the improvement and prosperity of said City, which said litigation was compromised and settled by a consent decree rendered in the District Court of Brazoria County, on the first day of April, 1869, in a suit wherein the said Corporation of the City of Galveston was plaintiff and the Wharf Company was defendant, and by a further consent decree, rendered in said District Court, on the 2nd day of November, 1869, in a suit wherein the Galveston City Company was plaintiff, and the Corporation of the City of Galveston was defendant, and by a sale by the said Houston and Galveston Wharf and Press Company to the said Galveston Wharf Company, therefore,

Be it enacted by the Legislature of the State of Texas:

That the said compromises and settlements between said parties, and the said decrees of the District Court of Brazoria County, recited in the preamble hereto, are in all respects validated, ratified and con-

firmed; provided, however, that this Act shall not be so con-
32 strued as to affect the right or claim of any person whatever not a party to said suits, decrees or compromises.

Approved June 23, 1870.

This is to certify that the foregoing is a true copy of an Act passed by the Legislature, according to the records of this office.

In testimony whereof, I hereunto sign my name, and affix the seal of my office, this 24th day of June, A. D. 1870.

[L. S.] JAMES P. NEWCOMB,
Secretary of State.

EXHIBIT D.

Grant for Railroad by the State Legislature.

An Act Granting to the Galveston Wharf Company the Right to Make Railroad Connection With Their Wharves and the Railroads Entering to City of *of* Galveston.

Section I.

Be it enacted by the Legislature of the State of Texas.

That the Galveston Wharf Company shall have the right to construct, own, and operate a railroad, commencing at, or near the present terminus or Depot of the Galveston, Houston & Henderson Railroad, and running thence to the New Wharf owned by said Company, and thence along Avenue A until it has crossed Bean's Wharf, and thence along Avenue A, or a line to the North thereof, to the east end of Galveston Island, and to cross all streets and alleys on the route of such railroad, and to build switches from the track of said railroad, to each of the wharves of said Company; provided, that whenever said Railroad crosses Bean's Wharf on Avenue A, it shall run switches, turnouts, side switches, etc., to the T head thereof, if requested by the owners of said wharves, and shall furnish
33 all necessary and proper rolling stock upon said switches at Bean's Wharf, to enable said wharf to receive with dispatch all articles shipped to said wharf, or coming to said wharf for shipment, and to load and transport all articles landed at said wharf, and shall deliver and remove the same with the same dispatch and upon the same terms and conditions that articles are received, taken and removed from any other switch at any other wharf along the line of said road; and in case it should be necessary to run across any private property for the construction of said railroad, the said Company shall have the right to appropriate and condemn the same on payment of the fair value thereof, by agreement with the owner or owners, or in conformity with the general railroad law of this State.

Section II.

That said Company shall have the right to make connection with the Galveston, Houston & Henderson Railroad in case of any change in the terminus or depot of said railroad, and with any and all other railroads which may at any future time, enter the City of Galveston.

Section III.

That said Company shall have the right to carry and transport persons and freight on said railroad, and charge and receive reasonable compensation therefor, and to run their cars over any connecting railroad, in accordance with the general railroad law of the State.

Section IV.

That this Act take effect and be in force from and after its passage.

Passed August 4, 1870.

State Department,
Austin, Texas.

I, James P. Newcomb, Secretary of State for the State of
34 Texas, do hereby certify that the foregoing is a true copy of the original enrolled bill, now on file in my office.

Witness my hand and official seal at the office, in the City of Austin, this — day of August, A. D. 1870.

JAMES P. NEWCOMB,
[L. S.] *Secretary of State.*

EXHIBIT C.

Charter of the City of Galveston.

Said court shall be organized as provided in said Act, and have, use and exercise all the duties, jurisdiction and practise and proceedings therein provided, and prescribed. The board of Commissioners of said City shall, as soon as practicable after the passage of this Act, appoint the Recorder and all other officers of said court to hold office until the next ensuing biennial election or appointment of the successors of such Commissioners, when, and biennially thereafter, said Board of Commissioners shall appoint successors of such officers, and if at any time there be a vacancy in any of said offices, said Board of Commissioners shall by appointment fill the same for the unexpired term; Provided, however, that said Board of Commissioners may at any time provide that the City Secretary or his assistant, if any be created by said Board, shall be ex-officio clerk of said Court; and Provided, further, that said Board of Commissioners shall otherwise have, use and exercise all duties, powers and authority in

and by said act conferred generally on the councils or board of aldermen of cities, towns and villages; and Provide- further, that the compensation of the Recorder shall not exceed Twelve Hundred ($1,200.00) dollars per annum. Provided, the Board of Commissioners may appoint a Deputy City Attorney to represent the City and the State in all cases in said Corporation Court, and
35 who shall receive for his services the same fees now allowed the County Attorney in Justice Courts in misdemeanor cases.

Sec. 78*a*. That a certain agreement and contract of settlement, adjustment and compromise entered into by and between the City of Galveston and the Galveston Wharf Company, bearing date the 9th day of March, 1905, be and the same is hereby in all things ratified, approved and confirmed, a substantial copy of which said agreement and contract is as follows:

STATE OF TEXAS,
County of Galveston:

Know all men by these presents:

That to finally settle the question of the apportionment of dividends to which the City of Galveston is and shall be entitled from the Galveston Wharf Company, and to finally Compromise, settle and adjust all matters of difference and controversy, and all pending suits between said City of Galveston and said Galveston Wharf Company, the said City of Galveston, a body corporate and politic, and the said Galveston Wharf Company, a corporation duly incorporated under and by virtue of the laws of the State of Texas, having its domicile and principal office and place of business in the city and county of Galveston, Texas, have mutually contracted and agreed to and with each other, and do hereby mutually contract and agree to and with each other, as follows:

1. Said Galveston Wharf Company shall pay to said City of Galveston sixty thousand dollars ($60,000) as follows: Ten thousand dollars ($10,000) each year for three consecutive years and the balance of said total sum of sixty thousand dollars ($60,000) each, in five annual payments of six thousand dollars ($6,000) each, the payment of the first ten thousand dollars ($10,000) to be made on the first day of November, 1905, and the remaining payments to be made on the first day of November of each consecutive
36 year thereafter until the whole of the said sum of sixty thousand dollars ($60,000) shall have been paid, the said sum or an equivalent amount to be expended by said City of Galveston for drainage purposes in said city.

2. Said Galveston Wharf Company shall, as soon as this contract and agreement takes effect, dismiss its suit against said City of Galveston to recover overpayments of taxes, pending in the District Court of Galveston County, numbered on the docket of said court 12,796, involving, in round numbers, with interest, about fifty-seven thou-

sand dollars ($57,000), and said Galveston Wharf Company shall pay all court costs of said suit.

3. Said Galveston Wharf Company shall, as soon as this contract and agreement takes effect, pay to the said City of Galveston the sum of two thousand dollars ($2,000), and said City of Galveston shall receive said sum in full settlement of said city's claim against said Galveston Wharf Company for fire protection involved in cause No. 22,321, now pending in the District Court of Galveston County, Texas, and said Galveston Wharf Company shall dismiss its petition in said cause, and said City of Galveston shall dismiss its cross action or plea in reconvention in said cause, and said City of Galveston shall have the right to make a charge against said Galveston Wharf Company, from and after the dismissal of said cause, for fire protection, according to rates to be fixed by the Board of Commissioners of the City of Galveston or other government of said city, said rate, however, not to exceed forty cents per annum per thousand square feet of area occupied by said Galveston Wharf Company's sheds protected, said charge for fire protection only so long as said City of Galveston makes and enforces charges for fire protection against other persons or corporations for similar protection.

4. Said Galveston Wharf Company shall admit and recog-
37 nize that, by virtue of the hereinafter mentioned decree, said City of Galveston owns an undivided one-third interest in all the property of said Galveston Wharf Company situated between Thirty-first street and Forty-first street north of Avenue A, in said City of Galveston, including what would be the prolongation of Thirty-first street and Forty-first street, and all of intervening streets, if the same were opened, in the same manner as the said city's one-third interest is now recognized and established in the property of said Galveston Wharf Company situated in said City of Galveston between Ninth and Thirty-first streets north of Avenue A by the decree entered in the District Court of Brazoria County, Texas, on the first day of April, 1869, in a suit by said City of Galveston against said Galveston Wharf Company, which said decree was duly ratified and confirmed by an Act of the Legislature of the State of Texas, approved June 23, 1870, and said city's one-third interest in all of the said property of said Galveston Wharf Company between Ninth street and Forty-first street north of Avenue A, in said City of Galveston, shall be represented by said city's sixty-two hundred and twenty-two (6,222) shares of stock owned by said city in said Galveston Wharf Company.

5. Said City of Galveston shall have the right to open and construct drains and sewers, and combination drains and sewers to the channel of Galveston Bay, through and across any of said Wharf Company's property at such places between said Ninth and Forty-First streets as may be necessary, and the right of way and permission for that purpose is hereby granted by said Galveston Wharf Company to said City of Galveston, and said Galveston Wharf Company hereby releases any claim for compensation or damages against

city for the taking, use, construction and continuous maintenance of such drains, sewers and combination drains and sewers, and all such drains, sewers and combination drains and sewers so
38 opened and constructed shall extend to the channel of Galveston Bay; Provided, however, that if said city desires to construct any such drain (not a sewer nor combination drain and sewer) so as to empty into slip instead of the channel of the bay, said city shall first obtain written consent from said Galveston Wharf Company so to do, and if such consent is refused by said Galveston Wharf Company, nothing in this contract shall be construed to prevent said city from exercising any right of eminent domain it may have or acquire; and said city shall open and construct, at its own expense, all such drains, sewers and combination drains and sewers, through or across said Galveston Wharf Company's property, and the location of all such drains, sewers and combination drains and sewers shall be agreed upon between the City Engineer of said city and the superintendent of said Wharf Company, and in case they can not agree upon such location they shall select a third person, and the majority of the three shall select a location, but this agreement shall not be construed to impair said city's right of eminent domain. Said Galveston Wharf Company shall not be held liable for and is hereby released from liability for any damage or injury that may be done to said drains or sewers or combination drains and sewers by the construction of said Galveston Wharf Company of improvements upon its property or the operation or use of its said property for its ordinary business; provided, that if said Wharf Company shall construct any building, shed or permanent structure upon its said property any damage to any such drains or sewers or combination drains and sewers caused by said construction shall be promptly repaired by said Wharf Company at its own expense, or said drains or sewers or combination drains and sewers shall be, at the expense of said Wharf Company, promptly adjusted or arranged so as not to impair the efficiency thereof; and provided that said city shall, at its own expense, promptly, and to the satisfac-
39 tion of said Wharf Company, restore any and all property of said Wharf Company in any manner disarranged, disturbed or injured by or as the result of the construction by said city of any such drains or sewers or combination drains and sewers through or across said Wharf Company's property, to the same or as good condition as said property was in before such disarrangement, disturbance or injury.

6. Said Galveston Wharf Company shall be and hereby is released form any obligation to open any drains at its own expense and cost through or across any of its said property between said Ninth and Forty-first streets in said City of Galveston, and said Wharf Company shall have and is hereby granted the right and privilege, subject to the supervision of the city engineer of said city, to connect without charge any drains of its own with the drains or sewers or combination drains and sewers that may be constructed and maintained by said city through or across said Wharf Company's property; and said

one-third of said Wharf Company's entire property owned by said City of Galveston as aforesaid shall be exempt form taxation, and said city shall be entitled to and shall receive dividends from said Galveston Wharf Company in the same manner in which such dividends have heretofore been paid; that is, said city shall be entitled to and shall receive upon each of its sixty-two hundred and twenty-two (6,222) shares of stock the same amount of dividends as shall be paid by said Galveston Wharf Company on any other share of capital stock of said Wharf Company, all fixed charges and legitimate expenses of operating, maintaining, repairing and improving the entire property in the same manner as heretofore, including all taxes, interest and sinking funds that may be due or become due by said Wharf Company, to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest, sinking funds and dividends being hereby admitted by said city to be correct; and said Galveston Wharf Company shall hold
40 the title, subject to said city's one-third interest therein, to said entire property included in the territory north of Avenue A and between said Ninth and Forty-first streets in the City of Galveston, including what would be the prolongations of all streets if opened through said property; and the control and management of the whole of said Wharf Company's property, including said city's one-third interest therein to remain in said Wharf Company in the same manner as fixed by the before-mentioned decree of the District Court of Brazoria County, Texas, and said decree and all the terms and provisions thereof shall remain in full force and undisturbed except in so far as the same may be changed by this contract and agreement.

7. This contract and agreement shall take effect and become binding upon the respective parties hereto when the same shall have been confirmed and ratified by an Act of the Legislature of the State of Texas, and when such Act shall have taken effect, and not before.

In Testimony Whereof, said City of Galveston has caused these presents to be executed for it and on its behalf by the Mayor-President, and attested by the Secretary of the Board of Commissioners of said City of Galveston, and the corporate seal of the city hereto affixed in accordance with and by virtue of a resolution of the Board of Commissioners of said City of Galveston, adopted at the meeting of said Board of Commissioners held in the City of Galveston, Texas, on the ninth day of March, A. D. 1905, a certified copy — which is hereto attached and marked for identification "Exhibit A," and made a part hereof; and said Galveston Wharf Company has caused these presents to be executed for it and on its behalf by its president and attested by its secretary, and the corporate seal of said Galveston Wharf Company hereto affixed, in accordance with and by virtue of a resolution of the board of directors of said Galveston Wharf Company, adopted at the meeting of said board of directors held
41 at the office of said Galveston Wharf Company in the City of Galveston, Texas, on the ninth day of March, A. D. 1905, a

certified copy of which resolution is hereto attached and marked for identification "Exhibit B," and made a part hereof.

Executed in duplicate at Galveston, Texas, on the ninth day of March, A. D., 1905.

[Corporate Seal of City of Galveston.]

CITY OF GALVESTON,
By WM. T. AUSTIN,
Mayor-President of the Board of Commissioners of the City of Galveston.

Attest:
JOHN D. KELLEY,
Secretary of the Board of Commissioners of the City of Galveston.

[Corporate Seal of Galveston Wharf Co.]

GALVESTON WHARF CO.,
By JOHN SEALY,
President of said Galveston Wharf Co.

Attest:
JOHN E. BAILY,
Secretary of said Galveston Wharf Company.

EXHIBIT A.

Be it resolved by the Board of Commissioners of the City of Galveston, That said city do make and enter into the proposed contract with the Galveston Wharf Company for the final settlement of the question of the apportionment of dividends to which said City of Galveston is and shall be entitled from said Galveston Wharf Company, and for the final compromise settlement and adjustment of all matters of difference between said City of Galveston and the Galveston Wharf Company, which said proposed contract, bearing date the ninth day of March, 1905, is hereto attached, and that the Mayor-President of said Board of Commissioners of the City of Galveston be, and he is hereby empowered, authorized and directed to execute and sign said contract on behalf of the City of Galveston, and the Secretary of said Board of Commissioners of the City of Gal-
42 veston be, and he is hereby authorized, empowered and directed to attest said contract, and affix thereto the corporate seal of said City of Galveston.

STATE OF TEXAS,
City and County of Galveston:

We, Wm. T. Austin, Mayor-President of the Board of Commissioners of the City of Galveston, and Jno. D. Kelly, Secretary of said Board of Commissioners, do hereby certify that the foregoing is a true and correct copy of a resolution unanimously adopted by the Board of Commissioners of the City of Galveston at the meeting of

said Board held at the city hall in the City of Galveston, Texas, on the ninth day of March, 1905, as said resolution appears of record in the minutes of said meeting of said Board of Commissioners of the City of Galveston.

Witness our official signatures and the corporate seal of said City of Galveston hereto affixed at said City of Galveston, this the ninth day of March, 1905.

[Corporate Seal of City of Galveston.]

WM. T. AUSTIN,
Mayor-President of the Board of Commissioners of the City of Galveston.
JNO. D. KELLEY,
Secretary of the Board of Commissioners of the City of Galveston.

EXHIBIT "B."

Be it resolved by the Board of Directors of the Galveston Wharf Company, That said Galveston Wharf Company do make and enter into the proposed contract with the City of Galveston for the final settlement of the question of the apportionment of dividends to which said City of Galveston is and shall be entitled from said
43 Galveston Wharf Company, and for the final compromise, settlement and adjustment of all matters of difference and controversy, and all pending suits between said Galveston Wharf Company, which said proposed contract, bearing date of the ninth day of March, 1905, is hereto attached, and that the president of said Galveston Wharf Company be, and he is hereby empowered, authorized and directed to execute and sign said contract on behalf of said Galveston Wharf Company and the secretary of said Galveston Wharf Company be, and he is hereby authorized, empowered and directed to attest said contract and affix thereto the corporate seal of said Galveston Wharf Company.

STATE OF TEXAS,
City and County of Galveston:

We, Jno. Sealy, president of the Galveston Wharf Company, and Jno. E. Baily, secretary of said Galveston Wharf Company, do hereby certify that the foregoing is a true and correct copy of a resolution adopted by the board of directors of said Galveston Wharf Company at the meeting of said board of directors held at the office of said Galveston Wharf Company in the City of Galveston, Texas, on the ninth day of March, 1905, as said resolution appears on record in the minutes of said meeting of said board of directors.

Witness our official signatures and corporate seal of said Galveston Wharf Company hereto affixed at said City of Galveston, Texas, this the ninth day of March, 1905.

[Corporate Seal of Galveston Wharf Co.]

JNO. SEALY,
President of the Galveston Wharf Co.
JNO. E. BAILY,
Secretary of the Galveston Wharf Co.

(Indorsements:) Eq. No. 41. Galveston Wharf Co. vs. City of Galveston et al. Plaintiff's Bill of Complaint, and Order thereon. Filed May 10, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

44 *Order Granting R. J. Calder et al. Leave to Intervene.*

Filed June 15, 1920.

In the United States District Court for the Southern District of Texas, Sitting at Galveston.

In Equity.

#41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

This cause being heard on this the 15th day of June, 1920, upon the petition of R. J. Calder, C. McD. Robinson, Rebecca Trueheart, feme sole, Otto J. Heye, Betty Ballinger, feme sole, Emilie Kleberg, widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw, and George D. Morgan, for leave to intervene and prosecute the same, it is ordered that said petitioners have leave to intervene as plaintiffs herein and to prosecute this cause in accordance with the prayer of their petition.

J. C. HUTCHESON, JR.,
Judge.

(Indorsements:) No. 41, Eq. Galveston Wharf Co. v. City of Galveston et al. Or. granting R. J. Calder et al. leave to intervene. Filed 15 day of June, 1920. L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

45 *Petition in Intervention of R. J. Calder et al.*

Filed June 15, 1920.

In the United States District Court for the Southern District of Texas, Sitting at Galveston.

In Equity.

#41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

To the Honorable the Judge of said Court:

Come now R. J. Calder, C. McD. Robinson, Rebecca Trueheart, feme sole, Otto J. Heye, Betty Ballinger, feme sole, Emilie Kleberg, widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw, and George D. Morgan, all of whom are citizens and residents of the County of Galveston, State of Texas, and by leave of the Court first had and obtained file this their intervening petition herein, for themselves and for all others similarly situated, and complaining of the City of Galveston, H. O. Sappington, J. C. Purcell, George E. Robinson, A. P. Norman, John H. Gernand and Frank S. Anderson, all citizens of said State and residents of the County of Galveston, and their successors in office, said H. O. Sappington being the Mayor-President of said City, and said Purcell, Robinson, Norman and Gernand being the Commissioners thereof, being designated by the charter of said City as the Board of Commissioners of the City of Galveston and the five constituting the legislative, executive and governing Board of said City, with said Frank S. Anderson as the City Attorney of said City, alleges:

That the intervening petitioners, R. J. Calder, C. McD. Robinson, Rebecca Trueheart, Otto J. Heye, Betty Ballinger, Emilie Kleberg, Kilburn Moore and B. D. Moore are each owners of shares of the capital stock of the Galveston Wharf Company, plaintiff in
46 this cause, and that all the intervening petitioners are and for a long time have been inhabitants of the City of Galveston, and cestuis que trust and beneficiaries of and under the decree and contract of April 1, 1869, and the Act of the Legislature confirming the same, and the contract of March 9, 1905, and the Act of the Legislature confirming the same, all described and referred to in the plaintiff's petition herein, but the intervening petitioners John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan are not the owners of any shares of the capital stock of said Galveston Wharf Company.

These intervening petitioners, desiring to prosecute this suit, as co-plaintiffs with said Galveston Wharf Company, as well as for themselves, and to obtain all the relief sought and prayed for by said Galveston Wharf Company herein, adopt and make their own, in every respect and particular, each, every and all the allegations contained and set forth in the Bill of Complaint herein filed by said Galveston Wharf Company, and in all amendments thereof and likewise adopt and make their own the prayer of said Bill of Complaint and amendments, and pray that all the relief sought and prayed for by said Galveston Wharf Company be granted to these intervening petitioners, as well as to said Galveston Wharf Company.

JOHN ADRIANCE.
C. McD. ROBINSON.
REBECCA TRUEHEART.
OTTO J. HEYE.
BETTY BALLINGER.
R. J. CALDER.
KILBURN MOORE.
B. D. MOORE.
EMILIE KLEBERG.
C. H. DORSEY.
J. F. SEINSHEIMER.
A. SHAFER.
J. A. CROCKER.
THOMAS F. SHAW.
GEORGE D. MORGAN.

—— ——,
Attorneys for said Intervening Petitioners.

Subscribed and sworn to before me, the undersigned au-
47 thority, by said Kilburn Moore, B. D. Moore, C. H. Dorsey, J. F. Seinsheimer, George D. Morgan, this 9th day of June, 1920.

[SEAL.] H. A. ROBERTSON,
Notary Public in and for Galveston County, Texas.

Subscribed and sworn to before me, the undersigned authority, by said Emilie Kleberg this 9th day of June, 1920.

[SEAL.] CARRIE LLACA,
Notary Public in and for Galveston County, Texas.

Subscribed and sworn to before me, the undersigned authority, by said John Adriance, C. McD. Robinson, Rebecca Trueheart, Otto J. Heye, Betty Ballinger, R. J. Calder, A. Shafer, J. A. Crocker, and Thomas F. Shaw, this 10th day of June, 1920.

[SEAL.] H. A. ROBERTSON,
Notary Public in and for Galveston County, Texas.

(Indorsements:) No. 41, Eq. Galveston Wharf Company vs City of Galveston, et al. Petition in intervention of R. J. Calder, et al. Filed June 15, 1920. L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

48 *Defendants' Original Answer.*

Filed June 5, 1920.

In the United States District Court for the Southern District of Texas, at Galveston, Texas.

In Equity.

No. 41.

GALVESTON WHARF CO.

vs.

CITY OF GALVESTON, H. O. SAPPINGTON, Mayor, President; J. C. Purcell, Geo. E. Robinson, A. P. Norman, and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney.

The answer of the defendants to the Bill of Complaint of the plaintiff is as follows:

I.

Defendants admit the allegations of fact on page (1) of plaintiff's bill and down to the paragraph on page (2), beginning: "That controversies having arisen, etc." They pray the production upon the trial of copies of the acts of the Legislature referred to, and to such copies, when so produced, pray leave to refer for the terms and conditions thereof.

II.

In reference to the allegations of fact in plaintiff's bill beginning on page (2) with, "That controversies having arisen, etc.," down to the allegations on page (6) beginning, "Plaintiff issued 100 shares of its stock to the attorneys for the city, etc.," these defendants admit that controversies between the city and those claiming under the Menard grant from the Republic of Texas, arose, as alleged, and that the Supreme Court in City of Galveston vs. Menard, 23 Tex. 349 rendered a decision in respect thereto substantially as alleged by plaintiff, but for the purport and effect of such decision by the Supreme Court they pray leave to refer to the judgment and opinion of the Court. These defendants admit that there were also other suits pending, as alleged, amongst which was a suit against
49 plaintiff, in which a consent decree was entered in the district court of Brazoria Co. on the 1st day of April, 1869, and admit that the allegations in plaintiff's bill substantially set forth the terms and conditions of such decree, but these defendants pray the produc-

tion, upon the trial of this cause, of a duly authenticated transcript of the proceedings in said case, and pray leave to refer thereto, when so produced for a true and legal purport, tenor and effect of said consent decree.

III.

These defendants are without knowledge as to plaintiff's issuing to the attorneys for the city, 100 shares of stock as part payment for their fees in said litigation.

IV.

Defendants admit the allegations of fact set forth in that part of plaintiff's Bill of Complaint beginning on page (6), as follows: "Plaintiff's stockholders on the 8th day of May, 1869, etc.," down to the allegation on page (7) beginning, "That the mayor, aldermen, and inhabitants, etc." These defendants pray that duly authenticated copies of the resolutions of 1869, the conveyance to plaintiff by the Houston & Galveston Wharf & Press Co., the conveyance from the Galveston City Co. to plaintiff, the decree of the Brazoria County court, and the act of the Legislature referred to, be produced upon the trial hereof; and when so produced, they pray leave to refer thereto for the terms, purport, tenor, and effect thereof.

V.

In answer to that part of plaintiff's bill on page (7), beginning, "That the mayor, aldermen and inhabitants, etc." down to that part on page (7) beginning, "That continuously after May, 1869, etc.," these defendants say they are without knowledge as to whether the mayor, aldermen and inhabitants of the City of Galveston
50 did, or did not, in May, 1869, or at any time thereafter, request or demand the issuance of any additional shares. These defendants admit that the city has been paid dividends on its stock, at the same rate and to the same extent that dividends have been paid on the other shares. These defendants aver that they have been informed, and believe, and therefore admit, that provision was made by plaintiff, as alleged, for the expenses of operation, taxes, interest on bonds, and other indebtedness, necessary amounts for sinking found for retiring bonds, expenditures for improvements, amounts necessary to pay indebtedness, and all other legitimate charges or expenses, before dividends were declared.

VI.

These defendants are without knowledge as to whether plaintiff continuously after May, 1869, and for more than 10 years had peaceful and adverse possession of the land purchased from the Houston & Galveston Wharf & Press Co., using and enjoying the same, having wharves, piers, railroad tracks and other improvements

thereon, as alleged, and leave plaintiff to make thereof upon the trial as it may be advised.

These defendants admit that the Supreme Court of Texas, as alleged by plaintiff, on or about December 19, 1884 in 63 Tex. 14, rendered a decision in respect to taxation of the city's interests in the Wharf Co., but pray leave to refer to the judgment and opinion of the court in said cause for the true import, tenor and effect thereof. These defendants are without knowledge as to the construction placed on such decision by plaintiff, or whether plaintiff persistently claimed, as alleged, that the city had no interest therein except as a stockholder.

These defendants admit that plaintiff from 1869 to, and including, 1891 paid taxes on all property west of Thirty-first Street, but they are without knowledge as to whether, apparently by clerical error, from 1892 an undivided two-thirds of such property was
51 assessed for taxes. They leave plaintiff to make proof thereof at the trial as it may be advised.

These defendants are without knowledge as to whether on July 8, 1886, the city attorney rendered the opinion referred to, or the terms thereof, and pray the production of said opinion on the trial, and when so produced, pray leave to refer to the original of such opinion for the terms, tenor and effect thereof. These defendants admit that on or about July 8, 1886 the city council adopted a resolution instructing the assessor to assess the entire property west of Thirty-first street, except the ground claimed as streets, but they pray the production of such resolution, and when produced, pray leave to refer to such resolution for the exact terms, tenor and effect thereof. These defendants are without knowledge as to whether special counc*il* were employed by the city in August, 1889 and rendered opinions to the city of the purport, as alleged by plaintiff. These defendants pray the production of such opinions on the trial, and when produced, pray leave to refer to such opinions for the terms, tenor and import thereof. These defendants admit that plaintiff on March 15, 1904, in a written communication to the city, offered to pay taxes on all of the property west of Thirty-first Street, as alleged, claiming that the city had no interest therein as a stockholder. They pray leave to refer to the original of such communication on the trial for the tenor thereof.

These defendants admit that an agreement was made of like import to that alleged in plaintiff's bill, beginning on page (9) with "On March 9, 1905, the city, etc.," down to the paragraph on page (10) beginning, "That up to this time said agreement of March 9, 1905, has been fully performed." These defendants pray leave to refer to the copy of said agreement and to the act of the Legislature
52 approving the same for the exact terms, tenor and effect thereof. These defendants aver, however, that said agreement was void under section 11 of Art. 3 and section 3 of Art. 11 of the Constitution of 1876, for that, defendant city could not become a subscriber to the capital of plaintiff, make an appropriation or donation to plaintiff of its property or lend its credit or grant property of value to plaintiff; and because it was an attempt to create

an irrevocable and uncontrollable grant of special privileges and immunities to plaintiff and withdraw the same from the control of the Legislature contrary to the provisions of sec. 17 of Art. 1 of the Constitution of Texas of 1876.

Defendants admit that up to this time said agreement of March 9, 1905 has been performed.

Defendants admit that by an act of the Legislature, approved August 4, 1870, plaintiff was, as alleged, authorized to construct and operate railroads, but upon the trial pray leave to refer to the terms of said act for the tenor, effect and import thereof.

These defendants admit all of the allegations in plaintiff's bill, beginning at the bottom of page (10) with, "That on the 16th day of March, 1920, there was published in the 'Galveston Tribune,' a daily newspaper, etc.," down to the allegations on the bottom of page (15) beginning, "That said Board of Commissioners have, or will declare, said amendments adopted, etc."

Defendants admit the allegations to the effect that the Board of Commissioners have declared said amendments adopted, and in this connection aver that such amendments now form a part of the charter of the city of Galveston, having been duly and legally adopted at the election aforesaid, by a majority vote of the qualified voters of said city.

VII.

53 These defendants deny that plaintiff owns and holds the title to all of the property described in its bill of complaint, vested in it by the decree of April 1, 1869, and by the other facts alleged in its bill of complaint, including the agreement of March 9, 1905. These defendants deny that plaintiff owns and holds one-third of such property in trust for the benefit of present and future inhabitants of the city of Galveston, as alleged, to pay over the dividends in proportion to the shares, representing the same to the said city to be by it used for the benefit of the present and future inhabitants of such city. Defendants deny that plaintiff holds said property in trust for said city and its inhabitants, and deny that such an arrangement cannot be terminated and discharged except by a sale of the city's one-third interest upon a vote of four-fifths of all the qualified voters of said city, voting in favor of some clear and specific proposition therefor. These defendants admit, as alleged by plaintiff, that there is slight probability that four-fifths of the qualified voters of said city will ever or could be had in favor of any clear and specific proposition for the sale or other disposition of the city's interest in plaintiff as required by the terms of the consent decree of 1869 and the agreement of March 9, 1905. These defendants admit and allege that the consent decree of 1869 and the contract of March 9, 1905, if valid, would result investing in plaintiff the perpetual control, use, management and enjoyment of the city's property in plaintiff; and defendants further allege and admit that it was the purpose and intention of the parties to such decree and contract in requiring a four-fifths vote of the qualified electors of the city of Galveston to prohibit in perpetuity the alienation, conveyance,

assignment, transfer, pledge, mortgage, the subjection of such interest to liability for debt or in any other manner dispose of same. And these defendants further aver that if effect is given to such decree and agreement the perpetual management, control, use
54 and enjoyment of the city's property will be vested in plaintiff and that the alienation, assignment, transfer, pledge, mortgage or other disposition of such interest will be prohibited in perpetuity.

These defendants aver that both and each, said decree of 1869 and the contract of March 9, 1905, in so far as they so prohibit the alienation or other disposition of the city's interest, and in so far as they vest in plaintiff the management, control, use and enjoyment of plaintiff's interest are now and have at all times been void because in contravention of the Constitution, laws and public policy of the state of Texas, prohibiting the creation and allowance of perpetuities and because they constitute unlawful and unreasonable restraints on the alienation, assignment, transfer, pledge, mortgage or other disposition of such interest and because they unreasonably and unlawfully restrain and prohibit the city in the enjoyment, use, management and control of its fee simple interest in plaintiff; and because they unlawfully and unreasonably attempt to control by contract the exercise by the city and the Legislature of their governmental and police powers, duties, prerogatives and rights; and because they attempt to, and will, if given effect, create irrevocable and uncontrollable grants of special privileges and immunities beyond the control of the Legislature in contravention of Sec. 17 of Art. 1 of the Constitution.

VIII.

Defendants admit that the decrees of April 1, 1869 and the contract of March 9, 1905, as alleged, were approved and ratified by the Legislature of the state. They deny that plaintiff holds, owns, uses, manages and enjoys said property subject to any trust for the city. They deny that the attempted condemnation of said property, or any part thereof under the 7th proposition, or any partition thereof under the 25th proposition, or any attempt to sell the city's one-third
55 thereof under said propositions or any of them upon a majority only of the voters of said city would impair the obligation of any valid contract, and deny that it would deprive plaintiff of its property and its property rights. They admit that a sale thereof would deprive plaintiff of the right to control and manage all of said property. They deny that plaintiff would be deprived of any lawful trust without due process of law. They deny that to sell, condemn, or partition said property upon a majority only of the voters of said city would deprive the present and future inhabitants of the city, without due process of law, of their property, property rights, cestuis que trust, in one-third of said property and the stock representing the same. Defendants deny that plaintiff is the trustee of the city of Galveston and, as such, entitled to represent and protect its interest in said property.

IX.

Defendants admit that plaintiff has not within forty years paid a dividend on its stock exceeding 6% per annum, and that its dividends have averaged approximately 4.358%, as alleged, and that large sums of its earnings which might have been applied in the payment of dividends if paid out would have caused the dividends to have averaged a large amount. Defendants admit that a large amount has been expended in the permanent improvement of the property, as alleged, but defendants are without knowledge as to the exact amount thereof. They admit that is such amounts had been expended in dividends the city would have received approximately one-fourth thereof and the other stockholders approximately three-fourths, the exact proportion being that which the city's interest in the stock bears to the total outstanding stock. They admit that to the extent that such improvements have been made the city should receive the benefit of one-third (being the amount of its
56 ownership of the property), whereas if such amounts had been paid out in dividends it would have received only about one-fourth thereof, that being its proportion of the stock. Defendants admit that plaintiff has borrowed large sums of money and mortgaged its property, as alleged, and it admits that it has accumulated a sinking fund in the sum of approximately $902,000.00, as alleged, the exact amount of which defendants do not know. These defendants admit that after deducting from the face of the bonds the amount of the sinking fund there is a large amount due on such bonds, but are without knowledge as to whether there is any cash for the payment thereof. Defendants admit that if they have the right to partition such property the equities of the private stockholders should be provided for as required by law in such cases. Defendants admit that said proposition 25 makes no provision for adjusting equities in a court of law, but in this connection they aver that all of such equities can be adjusted in a court of equity, and that the same would and should be so adjusted whether such proposition provides therefor or not. Defendants admit that all of said property has been improved, as alleged, but deny that said property cannot be equitably partitioned in kind. They deny that said property cannot be partitioned without injuring and damaging the value and utility thereof. They admit that said property is now devoted to public use and has been so devoted for some years, as alleged. Defendants admit that now and for a number of years there has passed over the properties of plaintiff, as alleged, large tonnage of interstate and foreign commerce and some tonnage of state commerce and that such will continue in the future. Defendants admit that the rates of plaintiff, as alleged as to such interstate and foreign commerce, were subject to the regulation and control of the Interstate Commerce Commission and that such intrastate commerce is subject to the regulation and control of the Texas Railroad Commission. De-
57 fendants deny that a partition of said property would greatly impair and depreciate the value thereof as a whole, or of such

value of one-third, or such value of two-thirds. They aver that in a partition suit in equity the rights and equities of the parties can be adjusted. Defendants admit that said proposition 25 authorized a sale of the city's interest upon a majority vote of the voters of the city. but pray leave to refer to the terms of said proposition, as alleged in the bill, for the true purport thereof. Defendants deny that the sale of said property upon a majority note, as alleged, would impair the obligation of any valid contract or right of plaintiff as owner and trustee for its stockholders and the present and future inhabitants of said city. Defendants deny that said proposition relies solely upon the statutes of Texas for the right to partition, but aver that said proposition contemplates that rules of the court of equity in respect to partition would also apply. Defendants deny that the partition statutes of Texas passed since the decree of 1869 if held applicable would impair the obligation of any contract specified in such decree, because such statutes affect the remedy and none of the rights of the parties. These defendants deny that any such condemnation statutes of Texas, if applicable, as alleged, would unlawfully impair the obligation of any valid contract or deprive plaintiff, without due process of law, of any of its property and property rights either as owner or trustee. Defendants deny that the 7th proposition undertakes to confer authority on the city to condemn its own property and is not authorized by any court procedure or any law. They pray leave to refer to said 7th proposition for a determination of the authority which it confers.

X.

58 These defendants deny that the publication of said amendments and the agitation for the adoption thereof has impaired the value of the shares of plaintiff. These defendants are without knowledge as to whether some of said stock sold in January, 1920, for $85 per share, as alleged, and since then for $70 per share, and leave plaintiff to make proof thereof as it may be advised. Defendants deny that the amendments as purported parts of the charter of the city, as alleged, would be a cloud on the title of plaintiff to said property, depreciate the value thereof, depreciate the market value of the stock of its stockholders, damage and injure the credit of plaintiff, retard the development of said property, injure the beneficial interest of the present and future inhabitants of the city, and be a constant threat and menace to the plaintiff as alleged. These defendants admit that, unless restrained or enjoined, they may attempt to partition said property, or condemn the same, or both, but deny that any such course of action can not be done without great injury and irreparable damage to plaintiff and the city of Galveston. In this connection, however, defendants aver that no course of action has been decided upon or determined or threatened, and they can not at this time tell what course will be pursued by defendants under and by virtue of the powers vested in the city of Galveston by the adoption of the amendments aforesaid. These defendants therefore aver that this suit is premature.

Defendants admit that the city owns Pelican Island, a large por-

tion of which fronts on the channel of Galveston Bay, as alleged, and that much of it is at an elevation above storm water, and that it is capable of improvements as alleged.

Defendants aver, however, that such island could not be used for wharves and docks without the expenditure of large sums of money and the building of a railroad to the island or providing other mode of transportation to such island. Defendants admit that there is a large area on the eastern end of Galveston Island owned
59 and controlled by private parties, which could be improved by wharves, etc., and which will be protected by a sea wall, as alleged. Defendant admits that there are large areas of property susceptible of improvement for such purposes westward of the property held by plaintiff. Defendants aver, however, that none of said property could be made available for wharf facilities without the expenditure of large sums of money and that such work, under existing conditions, could not be done in a reasonable time.

XI.

These defendants are without knowledge as to whether the city has received in dividends in trust for its inhabitants $742,000.00 in excess of the additional amount of taxes which it would have received had taxes been paid along with the property held by plaintiff. Defendants admit that a large sum believed to be approximately the amount alleged by plaintiff has been expended in additions and improvements since April 1, 1869. Defendants aver that a portion of such expenditures have been out of the earnings of the city's interest in the properties. Defendant denies that it would be contrary to equity and good conscience to permit the city to condemn or appropriate the property held by plaintiff. Defendants admit that plaintiff now is, and has been since 1869, in possession of the property described in the bill of complaint, but aver that such possession was subject to the city's rights. Defendants admit that the amount in controversy amounts to the sum or value of $3,000.00, but denies that this is a suit arising under the Constitution of the United States, such as to give this court jurisdiction.

Defendants deny that plaintiff is entitled to any part of the relief prayed for in its bill.

XII.

These defendants aver that it was not the purpose or intention of the decree of April 1, 1869 or of the agreement of 1905 to create plaintiff a trustee of and for the city of Galveston or the future inhabitants of the city, but that the words used in such decree, showing that the city's interest was to be in trust, were merely to describe and recognize the fee simple rights and title of the city and were merely declaratory of the object and purpose of the decree in vesting the title to the property in the city and its officers as they then existed and their successors.

60 XIII.

These defendants aver that said decree of 1869, in so far as it was attempted therein to make the city's interest inalienable and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever was then, and ever since has been void, for that such provision was and is an unlawful and unreasonable restraint on the alienation or other disposition of the property then owned by, and by the decree vested in, the city of Galveston in fee, and because to enforce such provision would be the creation and allowance of a perpetuity then and ever since prohibited by the Constitution, public policy and laws of Texas. In this connection defendants aver that they have reason to believe, and do believe, and therefore aver, that at the time said decree was entered and ever since then it was known and believed that it would be impossible to secure a four-fifths vote of all the qualified voters of said city in favor of some clear and specific proposition, provided therein as a condition upon which the city's interest might be alienated, conveyed, or otherwise disposed of. In this connection these defendants aver that it will be impossible, at any time in
61 the future, to secure a four-fifths vote of all the qualified voters of the city of Galveston, as required by said decree, before the interest of the city could be disposed of, as required by the decree.

XIV.

Defendants further aver that they are informed and believe and therefore allege that at no time, either prior or since the entry of said decree of 1869, was an election held in which two-thirds of the qualified electors of the city of Galveston assented to the city's becoming a stockholder in or lending its credit to plaintiff, as was required by ordinance No. 10 appended to and made a part of the Constitution of 1866, in force at the time of entry of said decree. Wherefore, these defendants aver that said decree was then void in so far as it attempted to make defendant city a stockholder in plaintiff. In this connection defendant avers that the agreement of 1905, whereby and by the terms of which, defendant city attempted to vest in plaintiff its interest in the property covered by said agreement was void under Sec. 11 of Art. 3 and sec. 3 of Art. 11 of the Constitution of the state of Texas passed and adopted in 1876, for that by said purported agreement defendant city became a subscriber to the capital of plaintiff, made an appropriation and donation and lent its credit and granted property of value to plaintiff.

XV.

These defendants further aver that no valid or binding contract was made by the decree of 1869 or the agreement of 1905 in respect to disposing of the city's interest, because neither the Legislature nor the city had the right and power by a contract to take away

from the city of Galveston or from future Legislatures the right and power to determine when and upon what conditions the city's interest in plaintiff's property could be disposed of.

62 In this connection defendant avers that the said amendments adopted by the city to its charter were passed and adopted pursuant to sec. 5 of Art. 11 of the Constitution requiring only a majority vote of the qualified voters of said city, and it avers that each and all of said amendments are valid and lawful and are expressly authorized by the Constitution and statutes of this state. Defendants further aver that since the adoption of the aforesaid amendments defendants have not decided upon or determined what part, if any, of the powers vested in them by such amendments will be exercised in respect to the city's interest in plaintiff's property.

XVI.

Defendants aver that the fair value of the entire property of plaintiff, including the city's interest is approximately the sum of $12,000,000; that the tax rate of the city of Galveston, including school taxes is the sum of $2.00 on the $100 valuation. In each of the years 1917, 1918 and 1919 the city received in dividends $18,663.00 from its stock in plaintiff. The tax rate for the year 1919 was the sum of $1.85 on the $100 valuation.

Wherefore defendants pray that said bill of complaint be dismissed; and they pray for such other and further relief as they may be entitled under the rules of equity and will ever pray.

FRANK S. ANDERSON AND
McDONALD & WAYMAN,
Attorneys for Defendants.

(Indorsements:) No. 41. In Equity. Galveston Wharf Co. vs. City of Galveston et als. Defendants' Original Answer. Filed June 5, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy. Frank S. Anderson and McDonald & Wayman, Galveston, Texas, Attys. for Defendants.

63 *Answer of Defendants to Petition in Intervention.*

Filed June 15, 1920.

In the District Court of the United States for the Southern District of Texas, at Galveston.

In Equity.

No. 41.

GALVESTON WHARF CO.

vs.

CITY OF GALVESTON et al.

The answer of the defendants to the intervening petition is as follows:

Defendants admit all of the allegations of fact in said petition of intervention, except that they pray leave to refer to the decree of April 1, 1869 and the contract of March 9, 1905 and the acts of the Legislature confirming the same, for the purpose of determining whether intervenors are cestuis que trust and beneficiaries thereunder.

Intervenors having adopted the pleadings of plaintiff, these defendants for answer thereto adopt their pleadings filed and to be filed herein in answer to the pleadings of plaintiff.

Defendants pray for a dismissal of the petition of intervention and they pray for general relief.

FRANK S. ANDERSON,
McDONALD & WAYMAN,
Solicitors for Defendants.

(Indorsements:) No. 41. In Equity. Galveston Wharf Co. vs. City of Galveston et al. Answer of Defendants to Petition in Intervention. Filed 15th day of June, 1920. L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

64 *Order Granting Plaintiff Leave to Amend Bill of Complaint.*

Entered June 15, 1920.

United States District Court, Southern District of Texas, at Galveston.

From the Minutes of Said Court, Volume 2 of the Equity Journal, Page 198.

June Term, June 15, 1920.

Hon. J. C. Hutcheson, Jr., Judge Presiding.

Equity, No. 41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

Ordered, that leave be, and the same is hereby granted plaintiff to amend Bill of Complaint.

65 *Amendments to Bill of Complaint.*

Filed June 15, 1920.

In the United States District Court for the Southern District of Texas, Sitting at Galveston.

In Equity.

#41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

Now comes the complainant and with leave of the court amends its Bill of Complaint, as follows:

1.

By adding after the word "area" in the second line from bottom of page 6, "which deed was filed for record June 22nd, 1869, and recorded June 25th, 1869, in Book 2, Pages 10 and 11, Deed Records of said Galveston County."

2.

By inserting after the word "plaintiff" in the twelfth line of page 9, "which agreement was approved by M. E. Kleberg, then City Attorney."

3.

By inserting at the end of the paragraph ending with the word "thereof" on page 18, "and would greatly depreciate the usefulness of the property by the public, especially by the shipping public, and would be contrary to public policy."

4.

By inserting after the word "it" in the eighth line of page 19, "and held by it in trust for said present and future inhabitants."

5.

By adding after the word "thereof" at the end of the paragraph ending about the middle of page 20, "That on account
66 of the bonds of the city now outstanding the amount of tax levied by the city and necessary to be so levied for general or operating purposes and the limit on taxation fixed by Section 5 of Article 11 of the Constitution of Texas, of 2½% of the taxable property of the city, it is not possible in the event a condemnation decree is obtained by the city (Section 17, Article 1 of the Constitution of Texas requires payment before taking of the property) for the city to issue and sell bonds with which to provide the necessary money to pay the award or any material part thereof, so that such a decree would be merely a cloud on the title to the property of plaintiff and the beneficiaries of its trust. Herein plaintiff alleges that so much of its charter amendments which undertake to authorize the issuance of bonds to be secured only by lien on the property to be acquired without right of recovery over against the city, are void under said Section 5, Article 11.

On or about the 4th day of March, 1920, the Insurance Underwriters notified plaintiff that unless plaintiff shall elevate its wharves, piers and warehouses situated between 10th and 36th Streets to an elevation of 11 feet above mean low tide, such work of elevation to be done during five years from said date, approximately one-fifth thereof each year, the Insurance Companies will raise the rates of marine insurance on all cotton passing over or handled on the property of plaintiff during the months of July, August, September and October, the months in which tropical storms have occurred. Such increase in insurance rates would place the Port of Galveston at a disadvantage with other ports in competition with it and cause a large and material amount of business to be diverted, which would otherwise pass over the facilities of plaintiff, which would result in a

large and substantial loss in revenue to plaintiff, gross and net, the exact amount whereof cannot be estimated or computed.

67 To do such work would cost, about the sum of $1,637,811.55. Plaintiff has only approximately $250,000.00 available for such work. Under the conditions described herein it would be an injustice to its private stockholders for plaintiff to undertake to borrow money for such work, and secure the same by a lien on its property, which would not be a lien on the city's one-third, while one-third of the money, if expended in such improvements, would be on the undivided one-third of the city.

Prior to the adoption of such charter amendments plaintiff contemplated that it would perform the work demanded by the insurance companies and pay for the same out of the earnings of plaintiff, which would necessitate continuing to pay its stockholders dividends of only 3% which has been the rate of dividends since the 15th day of August, 1914. Under the conditions described herein it would not now be equitable to private stockholders of plaintiff to use earnings, which could otherwise be applied in the payment of reasonable dividends, in performing such work, when one-third approximately of the value of such work would be done on the undivided one-third interest of the city, while if such earnings are paid in dividends the city would receive only approximately one-fourth thereof, whereof the interest- of the entire property and of the stockholders including the present and future inhabitants of the city, of the public and of the shippers in this and others states and in foreign countries, require that the questions raised by said charter amendments be promptly decided, and that plaintiff, as owner and trustee, receive the aid and instruction of the court.

TERRY, CAVIN & MILLS,
Solicitors for Plaintiff.

68 STATE OF TEXAS,
County of Galveston:

J. J. Davis, being first duly sworn, deposes and says that he is Vice President and General Manager of the Galveston Wharf Company; that he has read the foregoing Amendments to the Bill of Complaint in the above styled cause, and knows the contents thereof and that the allegations thereof and the statements therein are true.

J. J. DAVIS.

Subscribed and sworn to before me this 12 day of June 1920.
[SEAL.] H. A. ROBERTSON.
Notary Public, Galveston County, Texas.

Endorsements: No. 41 Eq. Galveston Wharf Company vs. City of Galveston et al. Amendments to Bill of Complain. Filed June 15 1920, L. C. Masterson Clerk, by J. L. Sexton, Deputy.

69 *Answer of Defendants to the Amendments to the Bill of Complaint.*

Filed June 15, 1920.

In the District Court of the United States for the Southern District of Texas, at Galveston.

In Equity.

No. 41.

GALVESTON WHARF CO.

vs.

CITY OF GALVESTON ET AL.

Come, Defendants, in answer to the amendments to the Bill of Complaint and say:

I.

They admit the allegations in paragraph one.

II.

In answer to paragraph No. II., they are without knowledge as to whether such agreement was approved by M. E. Kleberg, then city attorney.

III.

In answer to the allegations in paragraph No. III., they deny that the usefulness of the property by the public would be greatly depreciated, as alleged, and deny that it would be contrary to public policy.

IV.

In answer to paragraph four, they deny the additional allegation made to the effect that it is held by it in trust.

V.

In answer to paragraph five, these defendants deny that on account of the bonds of the city now outstanding, and the amount of tax levied and to be levied, and the limit of taxation fixed by Sec. 5 of Art. 11 of the Constitution, that it will not be possible, in the event of a condemnation decree, for the city to issue and sell
70 bonds with which to provide the money to pay the award. Defendants deny that such a decree would be merely a cloud on the title to the property, as alleged. Defendants deny that such

charter amendments are void under Sec. 5 of Art. 11, as alleged.

Defendants are without knowledge as to whether the insurance underwriters on or about March 4, 1920 gave the notice to plaintiff as alleged. These defendants are without knowledge as to whether such increase in insurance rates, if made, would place the port of Galveston at a disadvantage with other ports, and are without knowledge as to whether it would cause a material amount of business to be diverted, and are without knowledge as to whether it would result in the loss of revenue to plaintiff, as alleged. They leave plaintiff to make proof as it may be advised.

Defendants are without knowledge as to what such work would cost and are without knowledge as to the amount plaintiff has available for such work. Defendants deny that it would be an injustice to its private stockholders for plaintiff to borrow the money for such work and secure the same by a lien on its property, as alleged.

These defendants are without knowledge as to whether plaintiff, prior to the adoption of such charter amendments, contemplated that it would perform the work, as alleged. Defendants deny that it would not now be equitable to private stockholders to use earnings in performing such work. These defendants admit that the questions raised by said charter amendments should be promptly decided, but aver that this honorable court is without jurisdiction.

In this connection defendants aver that neither the Board of City Commissioners nor the qualified voters of said city have, by
71 ordinance or otherwise, attempted to make effective any of the powers vested in them by said amendments; that before plaintiff's or intervenors' rights or titles could in any wise be affected by such amendments, or a cloud cast in any manner on the title to plaintiff's property, the powers granted by said amendments must be made effective by an ordinance or resolution of the Board of City Commissioners or by a majority vote of the qualified voters of said city, acting in the exercise of their legislative powers and prerogatives; that under the Constitution and laws of Texas and under the Constitution of the United States, neither the City of Galveston, its Board of Commissioners nor the qualified voters of said city should in advance be restrained in the exercise of their legislative powers conferred on them by said amendments. Wherefore, defendants aver that, unless and until some action is taken by ordinance or otherwise, no cause of action has arisen under the Constitution and laws of the United States. Defendants pray as in their original answer.

FRANK S. ANDERSON,
McDONALD & WAYMAN,
Solicitors for Defendants.

(Indorsements:) No. 41. In Equity. Galveston Wharf Co. vs. City of Galveston, et al. Answer of Defendants to the Amendments to the Bill of Complaint. Filed 15th day of June, 1920. L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

72 *Order Granting Leave to Plaintiff and Intervenors to File Supplemental Complaint and Replication.*

Filed Nov. 5, 1920.

In the United States District Court for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

Upon this the 4th day of November, 1920, upon the application of plaintiff and Intervening Petitioners in this cause leave is hereby granted them to file supplemental complaint and replication to the answer and pleadings of the defendants.

J. C. HUTCHESON, JR.,
Judge

(Indorsements:) No. 41, Eq. Galveston Wharf Company v. City of Galveston, et al. Order. Filed Nov. 5, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

73 *Plaintiff's Supplemental Complaint and Replication, etc.*

Filed Nov. 5, 1920.

In the United States District Court for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

Comes now Galveston Wharf Company, plaintiff in this cause, and by leave of the court files this its supplemental complaint and replication to the answer and pleadings of the defendants filed herein and alleges:

In addition to the matters of estoppel alleged in plaintiff's original bill of complaint, the City of Galveston is estopped from denying the validity, enforceability or constitutionality of the compromise decree entered in the District Court of Brazoria County April 1st, 1869, or the Act of the Legislature of the State of Texas, approved June 23, 1870 confirming the same, both of which are alleged and plead in plaintiff's original bill of complaint, or that any election was held authorizing said compromise decree, or contract, and is estopped from partitioning or condemning plaintiff's property for that;

(*a*) In a certain suit instituted by plaintiff in the District Court of Galveston County, Texas, against said City of Galveston, on or about the 31st day of July, 1882, to enjoin the collection by said City of Galveston of taxes upon more than two-thirds of plaintiff's property East of Thirty-first Street upon the ground that under and by virtue of said compromise decree the other one-third
74 thereof was held by the City in trust for the then present and future inhabitants of the City of Galveston solely for public purposes, and was exempt from and not subject to taxation, said City defended, affirming the validity of said compromise decree and Legislative Act and claimed that the character of its ownership of or interest in one-third of the property as fixed and established by said compromise decree was such that said one-third was not exempt from taxation, the contentions of plaintiff in said cause being sustained by the Supreme Court of Texas in Galveston Wharf Company vs. City of Galveston, 63 Texas, Page 14 on December 19, 1884;

(*b*) In a certain suit filed in the United States Circuit Court for the Eastern District of Texas at Galveston on or about June 9, 1879 numbered on the docket of said court —, Hitchcock & Co., holders of a judgment against said City of Galveston for $117,550, alleging that the City of Galveston was a stockholder in the Galveston Wharf Company, and was receiving dividends upon its stock therein, sued out a Writ of Garnishment against said Galveston Wharf Company, this plaintiff, as garnishee of said City, commanding said garnishee to answer what number of shares of its capital stock was owned by the City, which Writ of Garnishment having been duly served upon the garnishee, said garnishee, this plaintiff, by the directions and instructions of said City of Galveston pursuant to resolutions adopted by its City Council, answered in said cause for said City and for its benefit, and in accordance with said directions and instructions, that under and by virtue of said compromise decree and confirmatory legislative act, said Galveston Wharf Company had issued to, and there were held by the City of Galveston 6,222 shares of the capital stock of said Galveston Wharf Company, in trust for the then present and the future inhabitants of said City, and that under
75 and by virtue of said compromise decree and confirmatory legislative act said shares of stock and the dividends thereon were exempt from and not subject to said Writ of Garnishment, and it was so found and adjudged by the Court in said cause;

(*c*) That while said suit was pending and prior to the final decision thereof, this plaintiff declined to pay to said City the dividends accruing upon said 6,222 shares of its capital stock, and said City of Galveston, affirming and relying upon the validity of said compromise decree and confirmatory legislative act, in pursuance of resolutions adopted by its City Council, filed its suit in the District Court of Galveston County, Texas, on or about the 10th day of August, 1880, numbered on the docket of said court —, against this plaintiff and Hitchcock & Co., seeking to recover against this plaintiff judgment for the amount of said dividends, basing its claim upon its rights under and by virtue of said compromise decree and confirmatory legislative act, and asserting the validity thereof;

(*d*) That continuously since the date of said compromise decree said City of Galveston has retained said 6,222 shares of the capital stock of plaintiff issued to it as aforesaid and as alleged in plaintiff's original bill of complaint herein, and has actively participated in the management of said Galveston Wharf Company through directors selected by it as provided by the terms of said compromise decree, the Mayor of said City being at all times ex officio one of said directors and a member of said Galveston Wharf Company's finance committee;

(*e*) That during all said time plaintiff, without objection or protest of any kind by said City of Galveston, but on the contrary with its consent and with its active co-operation, participation and concurrence through its directors aforesaid, has authorized and
76 incurred the expenditure of and has expended millions of dollars of money taken from its earnings in purchasing additions to the property in developing, improving and placing permanent improvements upon the property involved in this suit including developments of and improvements placed upon such additions, when if such money so expended had been paid out in dividends to its stockholders, including said City of Galveston, approximately three-fourths thereof would have gone to its individual stockholders and one-fourth to said City, whereas the value of such additions and of the developments and improvements so made accrued one-third to said City of Galveston and two-thirds to its individual stockholders;

(*f*) That a very large and expensive part of said developments and improvements has been so made and placed in and upon parts of said property that would be occupied by streets of the City of Galveston were streets opened upon or through said property, so that if said compromise decree be held invalid and the parties placed in their original positions as the same existed prior to the date of said compromise decree, said part of such developments and improvements would stand in and upon streets of said City.

(*g*) That during all said time said Galveston Wharf Company, through its board of directors, including the directors representing said City of Galveston as aforesaid, has regularly during each year declared dividends upon its capital stock payable to its stockholders,

including said City of Galveston, and said City has at all times, without protest or objection of any kind, regularly collected and received the dividends so declared upon said 6,222 shares of said stock, issued to it in pursuance to said compromise decree and confirmatory legislative act, and has always retained and still retains all said
77 dividends, and has at all times accepted and received, and retained and still retains, all the benefits accruing to it under and by virtue of said compromise decree and confirmatory act;

(*h*) That between July 7th, 1869, when the Constitution of 1866 and Ordinance 10 ceased to exist, and June 23d, 1870, the date of the approval of the Act of the Legislature confirming said compromise decree of April 1st, 1869, said City of Galveston, by and through its directors designated as provided in said compromise decree, actively participated in the management of said Galveston Wharf Company and its affairs at meetings of the Board of Directors of said Company held on six several occasions, to-wit: December 15th and 23d, 1869, and January 8th, March 16th, April 14th and May 21st, 1870, and within said period said City of Galveston collected and received from plaintiff seven separate dividends upon said 6,222 shares of its capital stock, thus after Ordinance 10 ceased to be effective, affirming and re-affirming said compromise decree and agreement, in effect renewing the same, which thus re-affirmed and renewed was confirmed by the Legislative Act of June 23d, 1870, when there were no constitutional provisions, restrictions or limitations with which said compromise decree or said confirmatory act could in any wise conflict. At five of said six directors' meetings the Mayor of said City was one of the City's directors present and participating.

(*i*) That during all said time, to-wit: ever since the date of said compromise decree, said City of Galveston has assessed, levied and collected taxes upon plaintiff's property as alleged in plaintiff's original bill of complaint herein.

(*j*) That during all said time, to wit: ever since the date of said compromise decree, said City of Galveston, well knowing many purchasers were innocently purchasing and would purchase
78 shares of plaintiff's capital stock, in ignorance that said City of Galveston claimed or would ever claim any right to partition or condemn plaintiff's property, or that it questioned or would ever question the validity of said compromise decree and confirmatory act of the legislature, or that it claimed or would ever claim any right whatever superior to the rights of all other holders of plaintiff's capital stock, stood silent and permitted such purchasers to purchase such shares of stock paying valuable considerations therefor.

(*k*) In compliance with said contract of March 9th, 1905, ratified, approved and confirmed by the act of the Legislature of the State of Texas, which took effect April 15th, 1905, both plead and alleged in plaintiff's original bill of complaint herein, said plaintiff has waived and abandoned its claim for $57,000 overpayment of taxes (principal and interest) and dismissed its suit seeking to recover the same, and has paid to said City of Galveston the $60,000 for drainage pur-

poses and the $2,000 fire protection claim provided to be paid by said contract, and has up to this time in every respect and particular fully performed said contract, and said City of Galveston by entering into said contract and requesting the Legislature of Texas to approve and ratify the same, as well as by the express terms thereof, re-affirmed said compromise decree and the Act of the Legislature confirming the same and reasserted the validity thereof, by reason of all which said City is estopped from denying not only the validity of said compromise decree and said confirmatory act of the Legislature, but also said contract of March 9th, 1905 and the Act of the Legislature ratifying and confirming the same.

That if the City of Galveston ever had any right to partition or condemn plaintiff's property, which is not admitted but denied, it has long since lost any such right or pretended right by laches by reason of the acts and omissions, matters and things, alleged
79 in the preceding paragraph, and the various sub-paragraphs thereof, and by reason of its acts and omissions with respect to the reports of its City Attorney made in 1886, and of its Special Counsel made in 1899, as alleged in plaintiff's original bill of complaint, and by entering into the contract of 1905 alleged in said original bill of complaint, affirming the validity of said compromise decree and confirmatory legislative act, and requesting the Legislature of the State of Texas to ratify said contract, and neglecting and failing for more than fifty years to assert or attempt to enforce in any manner whatsoever its pretended rights of partition and condemnation, and upon the same facts is estopped from questioning the validity of the said compromise decree and confirmatory act.

That plaintiff has had and held actual, continuous, peaceable, open, notorious and adverse possession of the property involved in this suit, holding and claiming the same against the world (except as in said compromise decree provided), musing, enjoying and paying taxes upon the same, and claiming it under said compromise decree and confirmatory act of the Legislature, and under the deed from the Houston and Galveston Wharf and Press Company alleged in plaintiff's original bill of complaint herein, and under other deeds and written memoranda duly registered in the Deed Records of Galveston County, Texas, for more than ten years next prior to the year 1887, and ever since and including said year, and plaintiff here now pleads against the defendants the three, five and ten years Statutes of Limitation of the State of Texas.

That more than four years, and more than fifty years, have elapsed since the date of said compromise decree, and since the passage and approval of said Act of the Legislature confirming the same, and at no time heretofore has the City of Galveston or any of its officers or anyone authorized to act for it instituted any suit or
80 proceeding seeking the cancellation, vacation, annulment or setting aside of said compromise decree upon any ground or for any cause or reason whatsoever, and plaintiff here now pleads against the defendants the four years Statutes of Limitation of the State of Texas.

And plaintiff here now renews its prayer as the same is contained and set out in its original bill of complaint herein.

TERRY, CAVIN & MILLS,
Attorneys for Plaintiff.

STATE OF TEXAS,
County of Galveston:

J. J. Davis, being first duly sworn, deposes and says that he is Vice President and General Manager of the Galveston Wharf Company, that he has read the foregoing supplemental complaint and replication in the above styled and numbered cause, and knows the contents thereof, and that the allegations thereof and the statements therein made are true.

J. J. DAVIS.

Subscribed and sworn to before me the undersigned authority this 21st day of October, 1920.

[SEAL.] CHAS. S. PEEK,
Notary Public in and for Galveston County, Texas.

(Indorsements:) No. 41 Eq. Galveston Wharf Company v. City of Galveston et al. Plaintiff's Supplemental Complaint & Replication, etc. Filed Nov. 5, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

81 *Replication, etc., of Intervenors Robt. J. Calder et al.*

Filed Nov. 5, 1920.

In the United States District Court for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

Come now R. J. Calder, C. McD. Robinson, Rebecca Trueheart, feme sole, Otto J. Heye, Betty Ballinger, feme sole, Emilie Kleberg, widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw, and George D. Morgan, all of whom are citizens and residents of the County of Galveston, State of Texas, intervening petitioners in this cause, and by leave of the Court, for themselves and for all others similarly situated, file this replication to the answer and

pleadings of the defendants herein, and adopt and make their own, in every respect and particular, each, every and all the allegations contained and set forth in plaintiff's supplemental bill of complaint and replication to defendants answer and pleadings herein filed by said Galveston Wharf Company, and in any and all amendments thereof, and likewise adopt and make their own the prayer of said supplemental bill of complaint and replication and amendments, and pray that all the relief sought and prayed for by said Galveston Wharf Company be granted to these intervening, petitioners as well as to said Galveston Wharf Company.

82

R. J. CALDER.
C. McD. ROBINSON.
OTTO J. HEYE.
BETTY BALLINGER.
MRS. EMILIE KLEBERG.
KILBURN MOORE.
B. D. MOORE.
JOHN ADRIANCE, SR.
C. H. DORSEY.
J. F. SEINSHEIMER.
A. SHAFER.
JAMES A. CROCKER.
THOMAS F. SHAW.
GEO. D. MORGAN.

TERRY, CAVIN & MILLS,
Attorneys for said Intervening Petitioners.

Subscribed and sworn to before me, the undersigned authority, by said R. J. Calder, C. McD. Robinson, Otto J. Heye, Betty Ballinger, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, James A. Crocker, Thomas F. Shaw, Geo. D. Morgan this 26th day of October, 1920.

[SEAL.] CHAS. S. PEEK,
Notary Public in and for Galveston County, Texas.

Subscribed and sworn to before me, the undersigned authority, by said Mrs. Emilie Kleberg this 26th day of October, 1920.

[SEAL.] THEO. L. BAUSS,
Notary Public in and for Galveston County, Texas.

(Indorsements:) No. 41 Eq. Galveston Wharf Company v. City of Galveston, et al. Replication, etc. of Intervenors Robt. J. Calder et al. Filed Nov. 5, 1920. L. C. Masterson, by G. Predecki, Deputy.

83 *Agreement of Counsel Relative to Submission of Cause, etc.*

Filed Nov. 5, 1920.

In the District Court of the United States for the Southern District of Texas, at Galveston.

In Equity.

No. 41.

GALVESTON WHARF COMPANY

vs.

CITY OF GALVESTON et al.

It is agreed that this cause be considered as submitted to the Court on final hearing, and that final decree may be entered.

It is agreed that all of the documentary evidence offered on the hearing is to be considered as duly proven and that if it has not already been done, either party may file as a part of the record copy of any of the Special Acts of the Republic or the Legislature of Texas.

It is agreed that the affidavits of the witnesses including affidavits verifying original bill, amendment, petition in intervention, and answers offered on the hearing in June, 1920, and also affidavit verifying replication pleading estoppel to be filed, shall be regarded as their testimony to the same extent as though they had been called as witnesses and so testified, and shall constitute part of the record. Plaintiffs, intervenors and defendants may file additional pleadings covering any issues developed by the facts and evidence.

The defendants may file an affidavit of the City Secretary on the question of whether an election was held in 1869 authorizing
84 the compromise decree, which affidavit, if filed, shall constitute part of the record to the same effect as though the City Secretary had been called to testify.

The court is requested, before entering the final decree, to submit draft of same to attorneys for both parties so that they may have the opportunity of offering suggestions at any time before the final decree is entered.

TERRY, CAVIN & MILLS,
Attorneys for Plaintiffs and Intervenors.
FRANK S. ANDERSON,
McDONALD & WAYMAN,
Attorneys for Defendants.

(Indorsements:) Eq. 41. Galveston Wharf Company v. City of Galveston, et al. Agreement of Counsel. Filed Nov. 5, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

85 *Decree Dismissing Cause for Want of Jurisdiction.*

Filed Nov. 26, 1920.

In the United States District Court for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF CO., a Corporation, Complainant, and R. J. Calder, C. McD. Robinson, Rebecca Trueheart, Feme Sole; Otto J. Heye, Betty Ballinger, Feme Sole; Emilie Kleberg, Widow; Kilburn Moroe, B. D. Moore, John Adriance, Sr.; C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw, and George P. Morgan, Intervenors.

vs.

CITY OF GALVESTON, a Municipal Corporation, and H. O. SAPPINGTON, Mayor, President; J. C. Purcell, George E. Robinson, A. P. Norman, and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney, Defendants.

This cause having been submitted pursuant to a stipulation of counsel for the entry at this, the June, 1920, term of this Court of a final decree upon the pleadings and proofs heretofore submitted and heard, and said cause having been heretofore argued by counsel and mature deliberation having been had thereon, and the court having considered and found that said complainant's original bill of complaint and the amendment thereto and its supplemental bill of complaint and replication, and the intervenors' intervening petition and supplemental intervening petition and replication do not raise any federal question and hence do not state any cause of action within the jurisdiction of this Court, and that this Court is for that reason, and for that reason only, without jurisdiction of this cause, the Court in reaching said finding having entirely disregarded the

86 proofs submitted and not rendering any decree on the merits herein, said original bill of complaint and amendment thereto and supplemental bill of complaint and replication and said intervening petition and supplemental intervening petition, complaint and replication, and this cause, should be dismissed for want of jurisdiction;

It is, therefore, on this the 26th day of November, A. D., 1920, considered, ordered, adjudged and decreed by the Court that this cause, and the said original bill of complaint and amendment thereto and supplemental bill of complaint and replication of complainant, Galveston Wharf Company, a corporation, and said intervening petition and supplemental intervening petition and replication of the intervenors, R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a

feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emilie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan, be and the same hereby are dismissed for want of jurisdiction, without prejudice, all at the cost of complainant and intervenors.

J. C. HUTCHESON, JR.,
Judge Presiding.

(Indorsements:) No. 41, Eq. Galveston Wharf Company et al. v. City of Galveston et al. Decree dismissing cause for want of jurisdiction. Filed Nov. 26, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

87 *Petition for Appeal and Allowance Thereof.*

Filed Nov. 26, 1920.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY et al.

vs.

CITY OF GALVESTON et al.

To the Honorable J. C. Hutcheson, Jr., District Judge:

Galveston Wharf Company, Complainant, and R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emilie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan, Intervenors, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 26th day of November, A. D., 1920, dismissing said cause for want of jurisdiction, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings, papers and documents upon which said decree was made and based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, District of Columbia under the rules of such court in such cases made and provided.

And your petitioners above named pray that proper order relating to the security to be required of them be made.

TERRY, CAVIN & MILLS,
Solicitors for Complainant and Intervenors Above Named.

Dated Nov. 26th, 1920.

88 The foregoing is allowed upon Complainant and Intervenors giving bond as required by law for the sum of five thousand Dollars ($5,000).

J. C. HUTCHESON, JR.,
District Judge.

(Indorsements:) No. 41, Eq. Galveston Wharf Company et al. v. City of Galveston et al. Petition for Appeal and allowance thereof. Filed Nov. 26, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

89 *Assignment of Errors.*

Filed Nov. 26, 1920.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY et al.

vs.

CITY OF GALVESTON et al.

Now come Galveston Wharf Company, Complainant, and R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emelie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan, Intervenors in the above entitled cause, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in said cause and from the decree made by this Honorable Court on the 26th day of November, 1920.

I.

This Honorable Court erred in finding and holding that no Federal question is raised by the bill of complaint and other pleadings of Complainant and Intervenors.

II.

This Honorable Court erred in dismissing this cause and the bill of complaint and intervening petitions and other pleadings of Complainant and Intervenors for want of jurisdiction thereof in this court.

III.

This Honorable Court erred in holding that the bill of complaint herein, the supplemental bill of complaint, and the replications of Complainant fail to raise a Federal question and fail to show
90 a cause within the jurisdiction of this court, and erred in dismissing this cause as to said Complainant for want of jurisdiction.

IV.

This Honorable Court erred in holding that the intervening petitions of Intervenors, the supplemental intervening petitions and the replications of Intervenors fail to raise a Federal question and fail to show a cause within the jurisdiction of this court, and erred in dismissing this cause as to said Intervenors for want of jurisdiction.

Wherefore, said Complainant and Intervenors, appellants herein, pray that the said decree be reversed, and that this cause be remanded to said trial court with instructions to enter such judgment as should have been entered in said trial court.

Respectfully submitted,

TERRY, CALVIN & MILLS,
Solicitors and Counsel for said Complainant and Intervenors.

(Indorsements:) No. 41, Eq. Galveston Wharf Company et al. vs. City of Galveston et al. Assignment of Errors. Filed Nov. 26, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

91 *Allowance of Appeal.*

Filed Nov. 26, 1920.

In Equity.

No. 41.

GALVESTON WHARF COMPANY et al.

vs.

CITY OF GALVESTON et al.

On Motion of complainant, Galveston Wharf Company, and of intervenors, R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a

feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emelie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan, by their solicitors and counsel, Terry, Galvin & Mills, it is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be, and the same is hereby allowed solely upon the question of jurisdiction; that is, whether this court has jurisdiction of this cause, this cause having been by said order dismissed solely on the ground that this Court has no jurisdiction of the cause, and this being the only question certified herein to the Supreme Court of the United States in pursuance of the provisions contained in Section 238 of "The Judicial Code" (as amended by the Act of Congress approved January 28th, 1915, entitled "An Act to Amend an Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven"), that "Appeals and Writs of Error may be taken from the District Courts * * * direct to the Supreme Court * * * in any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from
92 the court below for decision"; and it is further ordered that a certified copy of the record and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond of complainant and intervenors on appeal be fixed at the sum of five thousand Dollars ($5,000 00/100).

J. C. HUTCHESON, JR.,
Judge.

Dated Nov. 26th, 1920.

(Indorsements:) No. 41, Eq. Galveston Wharf Company et al. v. City of Galveston et al. Allowance of Appeal. Filed Nov. 26, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

93 *Certificate to Supreme Court.*

Filed Nov. 26, 1920.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY, Complainant, and R. J. CALDER, C. McD. Robinson, Rebecca Trueheart, a Féme Sole; Otto J. Heye, Betty Ballinger, a Féme Sole; Emelie Kleberg, a Widow; Kilburn Moore, B. D. Moore, John Adriance Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw, and George D. Morgan, Intervenors,

vs.

CITY OF GALVESTON, A Municipal Corporation, and H. O. SAPPINGTON, Mayor, President; J. C. Purcell, George E. Robinson, A. P. Norman, and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney, Defendants.

Be it remembered that on the 26th day of November, 1920, at the present term of this Court, a decree was entered by this Court, dismissing the above entitled and numbered cause, and said complainant's original bill of complaint and the amendment thereto and its supplemental bill of complaint and replication, and the intervenors' intervening petition and supplemental intervening petition and replication, therein, upon the ground that said pleadings raise no Federal question and hence do not state any cause of action within the jurisdiction of this, the District Court of the United States for the Southern District of Texas, and therefore this Court has no jurisdiction over the subject matter of this suit, now, therefore, in pursuance of the provision contained in Section 238 of "The Judicial Code" (as amended by the Act of Congress approved January 28th, 1915, entitled "An Act to Amend an Act en-
94 titled 'An Act to codify, revise and amend the laws relating to the judiciary', approved March third, nineteen hundred and eleven"), that "Appeals and Writs of Error may be taken from the District Courts * * * direct to the Supreme Court * * * in any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision", this Court hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this Court over this cause, whether this cause presents a controversy which involves a Federal question under the laws or constitution of the United States; the only question which this Court considered and decided

in dismissing this suit and said pleadings being whether a Federal question was involved upon said pleadings of the complainant and intervenors, and said question of jurisdiction is the sole question hereby certified.

I further certify that the matter in controversy herein, as shown by the record, exceeds in value Three Thousand and no/100 Dollars ($3,000.00), exclusive of interest and costs.

Dated this 26th day of November, 1920.

J. C. HUTCHESON, JR.,
Judge of the United States District Court for the Southern District of Texas.

(Indorsements:) No. 41 Eq. Galveston Wharf Company et al. v. City of Galveston et al. Certificate to Supreme Court. Filed Nov. 26, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

95 *Appeal Bond.*

Filed Nov. 26, 1920.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY et al.

vs.

CITY OF GALVESTON et al.

Know all men by these presents: That we, Galveston Wharf Company, a Corporation, R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emelie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan as Principals, and Jno. Sealy and Geo. Sealy, as Sureties, are held and firmly bound unto City of Galveston, a Municipal Corporation, H. O. Sappington, Mayor President, J. C. Purcell, George E. Robinson, A. P. Norman and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney, appellees in the above numbered and entitled cause in the sum of Five Thousand Dollars ($5,000.00) for the payment of which to said defendants in error, their successors, executors or administrators well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our executors, administrators, representatives and heirs firmly by these presents.

Sealed with our seals, and dated this 12th day of November, 1920.

Whereas, lately at a District Court of the United States for the Southern District of Texas, in the Galveston Division of said Court,

in a certain suit numbered 41 on the Equity Docket of said Court, pending in said court between said Galveston Wharf Com-
96 pany as Complainant, and said R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emelie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan, as Intervenors, and City of Galveston, a Municipal Corporation, and H. O. Sappington, Mayor President, J. C. Purcell, George E. Robinson, A. P. Norman and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney, as defendants, a judgment was rendered dismissing said cause for want of jurisdiction, and the said Complainant and Intervenors above named having obtained the allowance of an appeal, and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation on appeal directed to the said defendants citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington in the District of Columbia, within thirty (30) days from this date;

Now, therefore, the condition of this obligation is such that if the above named Galveston Wharf Company and R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emelie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

GALVESTON WHARF COMPANY,
R. J. CALDER,
C. McD. ROBINSON,
REBECCA TRUEHEART,
OTTO J. HEYE,
BETTY BALLINGER,
97 EMELIE KLEBERG,
KILBURN MOORE,
B. D. MOORE,
JOHN ADRIANCE, SR.,
C. H. DORSEY,
J. F. SEINSHEIMER,
A. SHAFER,
J. A. CROCKER,
THOMAS F. SHAW,
GEORGE D. MORGAN,
All By TERRY, CAVIN & MILLS,
Their Solicitors.

JNO. SEALY.
GEO SEALY.

UNITED STATES OF AMERICA,
State of Texas,
County of Galveston, ss:

On the 12th day of November, 1920, personally appeared before me, Jno. Sealy and Geo. Sealy, known to me to be the persons described in and who executed the foregoing instrument as sureties, and being respectively by me duly sworn says each for himself, and not one for the other, that he is a resident and householder of the said County of Galveston, State of Texas, and that he is worth the sum of Five Thousand & 00/100 Dollars ($5,000.00) over and above his just debts and legal liability and property exempt from execution.

JNO. SEALY.
GEO. SEALY.

Subscribed and sworn to before me this 12th day of November, A. D., 1920.

CHAS. S. PEEK,
Notary Public.

The within bond is approved both as to sufficiency and form, and ordered filed by me this 26 day of November, 1920.

J. C. HUTCHESON, JR.,
Judge.

98 (Indorsements:) No. 41 Eq. Galveston Wharf Company et al. v. City of Galveston et al. Appeal Bond. Filed Nov. 26, 1920. L. C. Masterson, Clerk, by G. Predecki, Deputy.

99 In the District Court of the United States for the Southern District of Texas, Galveston Division.

In Equity.

No. 41.

GALVESTON WHARF COMPANY et al.

vs.

CITY OF GALVESTON et al.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the City of Galveston, a Municipal Corporation; H. O. Sappington, Mayor, President; J. C. Purcell, George E. Robinson, A. P. Norman, and John H. Gernand, Commissioners, and Frank S. Anderson, City Attorney, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the

City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District *Clerk* of the United States for the Southern District of Texas, Galveston Division, from a final decree signed, filed and entered on the 26th day of November, 1920, in that certain suit, being in Equity No. 41, wherein Galveston Wharf Company, a corporation, is Complainant, and R. J. Calder, C. McD. Robinson, Rebecca Trueheart, a feme sole, Otto J. Heye, Betty Ballinger, a feme sole, Emelie Kleberg, a widow, Kilburn Moore, B. D. Moore, John Adriance, Sr., C. H. Dorsey, J. F. Seinsheimer, A. Shafer, J. A. Crocker, Thomas F. Shaw and George D. Morgan are Intervenors, and you are defendants, and appellees to show cause, if any there be, why the decree rendered against the said appellants as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 26th day of November, 1920, and of the Independence of the United States the One Hundred and Forty-fifth Year.

[Seal of the United States District Court, Southern District of Texas.]

J. C. HUTCHESON, JR.,
United States District Judge for the Southern District of Texas.

100 Service of the within citation on appeal is hereby accepted by and for the said appellees and all further notice thereof is hereby waived this 27th day of November, 1920.

FRANK S. ANDERSON,
McDONALD & WAYMAN,
Attorneys for Appellees.

[Endorsed:] No. 41, Eq. Galveston Wharf Company et al. v. City of Galveston et al. Citation on appeal and acceptance of service thereon. Filed Nov. 27, 1920. L. C. Masterson, clerk, by G. Predecki, deputy. Terry, Cavin & Mills, attorneys.

101 *Clerk's Certificate.*

In the District Court of the United States for the Southern District of Texas, at Galveston.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignment of errors, and all proceedings in the case, as called for in the Precipe for Transcript, on page 1, of said

Transcript, in cause No. 41, on the Equity Docket of said Court, entitled Galveston Wharf Company, et al., vs. City of Galveston, et al., as the same now appears on file and of record in my office.

To certify which, witness my hand and seal of said Court, at Galveston, in said District, this the 11th day of December, A. D. 1920.

[Seal of the United States District Court, Southern District of Texas.]

L. C. MASTERSON,
Clerk U. S. District Court, Southern District of Texas,
By G. PREDECKI,
Deputy.

[Endorsed:] No. 41, In Equity. United States District Court, Southern District of Texas. Galveston Wharf Company, et al. vs. City of Galveston, et al. Copy of the record, assignment or errors, and all proceedings in the case, as called for in the precipe for transcript, on page 1 of said Transcript.

Endorsed on cover: File No. 28,014. S. Texas, D. C. U. S. Term No. 657. Galveston Wharf Company, R. J. Calder, et al., appellants, vs. City of Galveston, et al. Copy of the record, assignment of errors, 28,014.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 19

GALVESTON WHARF COMPANY,
R. J. CALDER, ET AL.,
APPELLANTS,

vs.

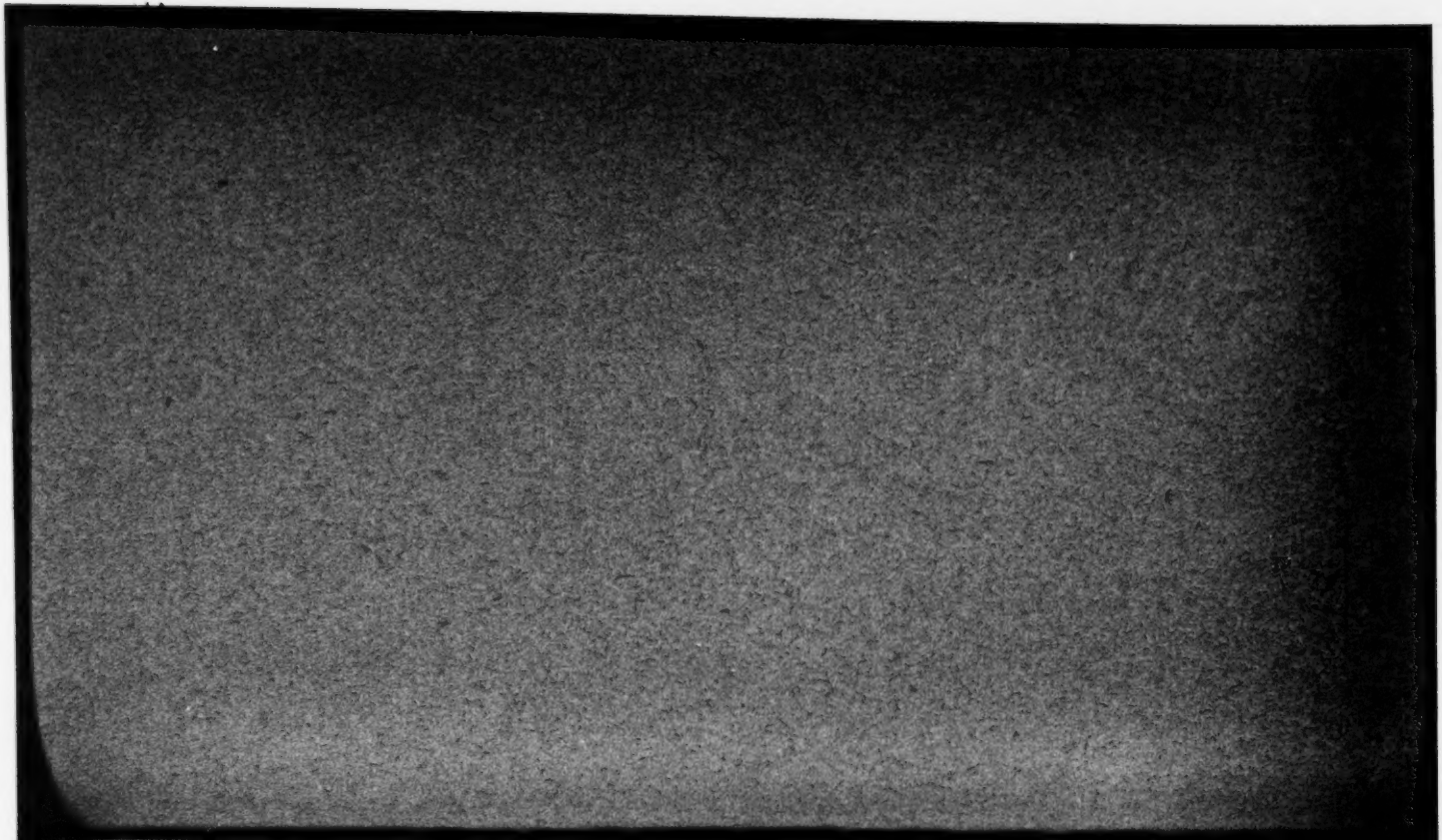
CITY OF GALVESTON, ET AL.,
APPELLEES.

Appeal from the District Court of the United States for the Southern District of Texas.

Brief for Galveston Wharf Company, R. J. Calder, Et Al., Appellants.

J. W. TERRY,
Solicitor for Galveston Wharf Company, R. J. Calder, Et Al., Appellants.

TERRY, CAVIN & MILLS,
Of Counsel.



SUBJECT INDEX.

III.

SUBJECT INDEX.

APPENDIX.

IV.

INDEX OF AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 19

GALVESTON WHARF COMPANY,
R. J. CALDER, ET AL.,
APPELLANTS,

vs.

CITY OF GALVESTON, ET AL.,
APPELLEES.

Appeal from the District Court of the United States for the Southern District of Texas.

Brief for Galveston Wharf Company, R. J. Calder, Et Al., Appellants.

STATEMENT OF THE CASE.

On May 10th, 1920, the Appellant, Galveston Wharf Company, filed in the United States District Court for the Southern District of Texas, Galveston Division, its Bill in Equity against the City of Galveston, and H. O. Sappington, J. C. Purcell, George E. Robinson, A. P. Norman, John H. Gernand and Frank S. Anderson, and their successors in office, alleging that Plaintiff, Appellant here, Galveston Wharf Company, was a corporation incorporated by and under an Act of the Legislature of the State of Texas, approved February 25th, 1854, entitled An Act to Incorporate the Galveston Wharf & Compress Company and an Act Amendatory thereof, approved February 11th, 1860, by which last

named act the name of Apellant was changed to Galveston Wharf Company; and that the City of Galveston is a municipal corporation existing under a special act of the legislature approved March 30th, 1903, and under acts of the Legislature amendatory thereof, and a number of amendments to its charter adopted under Section 5, Article XI of the Constitution of Texas, and the Acts of the Legislature of said State passed in pursuance thereof, and that H. O. Sappington is the Mayor-President of said City and the said Purcell, Robinson, Norman and Gernand, the Commissioners thereof, being designated by the Charter as the Board of Commissioners of the City of Galveston, and the five constituting the legislative, executive and governing board of said City, with said Frank S. Anderson as the City Attorney of said City.

The suit was brought to perpetually enjoin the City of Galveston and the other Defendants named, and their successors in office, from enforcing or attempting to enforce certain amendments to the Charter of said City that will be hereafter fully set out. (R. 3-27.)

On June 15th, 1920, R. J. Calder and a number of others, alleging that they were citizens, residents and inhabitants of said City of Galveston, filed their intervening petition in said cause, having duly obtained leave so to do, and adopted as their own the allegations of Appellant, Galveston Wharf Company's Bill of Complaint and prayed for the same relief prayed for in said Bill. (R. 30-31.)

On June 5th, 1920, the Defendants filed their original answer to Appellant Galveston Wharf Company's Bill and on June 15th, 1920, filed their answer to the petition of the Intervenor's (R. 32-42), which in view of the disposition made of the case by the District Court need not be further referred to here.

Having duly obtained leave, the Appellant Galveston Wharf Company filed amendments to its original Bill on June 15th, 1920 (R., 43-45), to which the defendants on the same day filed their answer (R. 46-47), and on November 5th, 1920, having duly obtained leave Appellant and Intervenors filed suplemental complaint and replication (R. 48-54), alleging various matters of estoppel against the Defendants to

deny the validity and enforceability of certain contracts, confirmed by acts of the Legislature, relied on by plaintiff and intervenors.

Appellant Wharf Company further alleged in its Bill that the matter in controversy exceeded the sum or value of Three Thousand Dollars ($3,000.00) and arose under the Constitution of the United States, such allegation being predicated upon certain contracts approved and confirmed by Acts of the Legislature, fully set out in Appellants' pleadings, the obligations of which they alleged would be impaired by the enforcement of certain of the amendments to the Charter of the City of Galveston, hereinbefore referred to, and that they would be thereby deprived of their property and property rights without due process of law, and the trust created by said contracts destroyed, and that they were without adequate remedy at law (R. 13, 14, 15), and that said charter amendments clouded the title to their property. (R. 15.)

The cause having been argued and submitted, the trial court entered a decree on the 26th of November, 1920, finding that Appellant's Original Bill of Complaint and the amendment thereto and its supplemental bill of complaint and replication and the Intervenor's Petition and supplemental intervening petition and replication did not raise any federal question and hence did not state any cause of action within the jurisdiction of said court, and reciting that in reaching and finding the court had entirely disregarded the proofs submitted and that the court did not render any decree on the merits of the case, dismissed said original bill and amendment and supplemental bill and replication and the Intervenors' intervening petition and supplemental intervening petition and replication for want of jurisdiction and without prejudice. (R. 56-57.)

The Court below also duly certified the question of jurisdiction to this Court. (R. 61-62.)

The sole question before the Court on this appeal is, therefore, whether the pleadings of the Appellants state a case admittedly true for the purposes of the appeal, which involves the decision of a federal question so as to give the court below jurisdiction of the controversy.

We find it impracticable to fully and exactly state to the Court in the manner in which such questions arise without setting out very fully and, indeed, often verbatim, the allegations of Appellants' pleadings, including the contracts, the obligations of which they claim would be impaired by the enforcement of the charter amendments attacked in this case, and the circumstances out of which the contracts grew, culminating in the execution of them and the performance of their terms for a long period of time, and said charter amendments themselves as adopted.

These amendments were adopted by a majority of about 240 votes cast at an election held in the City of Galveston on May 4th, 1920 (R. 9-12), under an amendment of Section 5, Article XI, of the Constituion of the State of Texas, adopted in 1912, amending said Section 5 so as to read as follows:

"Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the state, or of the general laws enacted by the legislature of this state; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years," and an Act of the Legislature of the State of Texas, adopted in 1913, which is a verbatim enactment into a Statute of the above quoted Constitutional Amendment.

Prior to the adoption of said constitutional amendment, and at the times said contracts were executed, cities of 5000 inhabitants could be chartered, and their charters amended, only by Act of the Legislature.

Appellants alleged in their original bill, among other things:

"That controversies having arisen between the City of Galveston, which claimed the ownership of the lands in front of the City which were submerged or subject to the ebb and flow of the tide in Galveston Bay, called flats, under an Act of the Legislature of the State undertaking to grant title thereto, with wharf privileges of (to) said city, and those claiming under a grant by the Republic of Texas to M. B. Menard of a league of land located on the eastern end of Galveston Island, including all land upon which the City was then and now is located, the Supreme Court of the State in City of Galveston vs. Menard, City of Galveston vs. Lufkin, 23 Texas, 349, decided that Menard had acquired title to said lands or flats and the wharf privileges in the channel of Galveston Bay in front of the same, but that the Galveston City Company, which had acquired title to the Menard grant had, by platting a part of said grant into blocks or lots showing streets thereon and selling blocks and lots with reference to such plat or map, and to a resolution adopted by it April 17th, 1838, explanatory thereof, dedicated to the public certain streets running through said flats to the channel of Galveston Bay, with wharf privileges at the end of such streets, but held that Lufkin had acquired title by limitation to that part of 25th Street or Bath Avenue north of the street called Avenue A extending through such flats to the channel, and to the wharf privileges at the end thereof; that it is probable that the City had also lost title by limitation to several other streets or parts thereof between such Avenue A and the channel, concerning which there were no judgments or decrees establishing such titles. (R. 4.)

"There were other suits pending by the City of Galveston involving other portions of such flats and the streets claimed to run through the same; the width of the streets running to the channel was 80 feet, with the exception of Bath Avenue or 25th Street, which was 120 feet, while the intervening spaces between such streets were 300 feet, so that the City, having lost title to Bath Avenue and probably to other streets by limitation, the utmost of its claim under the decision in

City vs. Menard, was to less than one-fifth of the area north of Avenue A between Ninth and Forty-first Streets; and among others, a suit against plaintiff, in which suit a compromise or agreed decree was entered in the District Court of Brazoria County, said state, the first day of April, 1869, which, while so entered as a decree was in fact a contract, as appears on the face thereof, between the City of Galveston, the official title whereof was at that time "Mayor, Aldermen and Inhabitants of the City of Galveston;" that by said decree it was provided that the then capital stock of plaintiff, consisting of 12,444 shares, at $100.00 each, be increased the full one-half thereof, that is, by 6,222 shares, which said 6,222 shares should be the property of the Mayor, Aldermen and Inhabitants of the City of Galveston, and that the same should stand and remain on the books of plaintiff as the property of said Mayor, Aldermen and Inhabitants of the City of Galveston, and that an equal undivided one-third of the property of plaintiff to be consolidated and vested in it shall be owned by said City and represented by said stock, and that the said stock and the rights and interest therein and in said property of said Mayor, Aldermen and Inhabitants of the City of Galveston shall be in trust for the present and future inhabitants of the City of Galveston, and all and every part thereof shall be inalienable and not subject to conveyance, assignment, transfer, pledge or mortgage, in any other manner than by a four-fifths vote of all of the qualified voters of said City in favor of some clear and specific proposition therefor, and that the dividends and net earnings of said stock shall be regularly paid to said Mayor, Aldermen and Inhabitants of the City of Galveston to be disbursed and expended for the public good and benefit of said present and future inhabitants of said City, and that said City shall be represented by three directors, one of whom shall be the Mayor, another shall be an Alderman of said city and the third shall be either an Alderman or a citizen of said City, both to be elected by the common council of said City, and that the other six directors of plaintiff shall be elected by the remaining stockholders exclusive of the stock of the City. It was further provided that in all stockholders' meetings of plaintiff no measure shall be adopted and no vote, act, or pro-

ceeding shall be valid unless by a vote of three-fourths of all of the stock of plaintiff, exclusive of the stock of the City. It was then provided that all of the property rights and claims of every kind and description (except certain specified lots and property) of plaintiff, and also all of the right, title, interest and claim of every kind and description whatsoever of the said Mayor, Aldermen and Inhabitants of the City of Galveston in and to all of the land and ground extending from the shore or ordinary high water mark of the Island of Galveston, to the channel of the Bay from and including the street shown on the map as Ninth Street on the east, to and including the street known as Thirty-first Street on the west, including all the ground known as the flats within said limits, and all rights, capacity, powers and claims of said Mayor, Aldermen and Inhabitants to build and erect wharves and take and receive wharfage therefor at the end of the streets now or hereafter running or extending to the channel be vested in the plaintiff (there called Galveston Consolidated Wharf Company) and be henceforth the corporate property, right and title of the said Galveston Wharf Company, and owned, held, possessed, controlled, used and administered by said company—all the said united and consolidated property rights and claims being represented by such aggregate of $1,866,600.00 stock, the original two-thirds thereof held by the present stockholders and one-third by said City, in trust as aforesaid. It was then stated that the rights of the City in certain parts of said flats intended to become the future property of plaintiff, then in litigation and controversy between said City and the Galveston City Company, were denied by the said City Company and other parties, and also in controversy between said City and A. H. Bean and others, in suit No. 2437, and that the settlement and arrangement should have no constructive operation or effect whatever to prevent the City from maintaining and continuing all suits now pending, or from instituting other suits necessary or proper to recover and enforce the right and claim of said City to all of said flats, which in adverse right is or shall be held and claimed by any and all other parties against City or against this plaintiff, there called "The Company herein united and consolidated," and recovery

by the City in all such suits and all future title to any part of the said flats in front of the City within the aforesaid limits hereafter acquired in any manner by either party, to inure to the common benefit of the parties to the decree, and of the good faith, fulfillment and execution of this compromise. It was then specified that certain property of the plaintiff to be excepted under the terms of said decree should be withdrawn and conveyed by plaintiff to a trustee or trustees to be held and disposed of for the use and benefit of the stockholders of plaintiff prior to this compromise. It was then stated: 'It is further the agreement and intention of the parties that this settlement shall, if practicable, result in and secure the final settlement of all controversy, and prevent future controversy in regard to all the wharf privileges in front of the City of Galveston, and that the whole of said wharf privileges shall be united and consolidated in the present parties hereto.' (R. 4-6.)

"It was provided that plaintiff should pay all expenses incident to the litigation hereby compromised, and that plaintiff should have the right to issue additional stock to dispose of same to raise the necessary funds to pay off such expenses, and to do the same after the issuance to the City of its 6,222 shares of stock. A copy of said decree or contract of April 1, 1869, is attached hereto as a part hereof, marked Exhibit A. (R. 6).

"Plaintiff issued 100 shares of its stock to the attorneys for the City in said litigation, as part payment of their fees. Plaintiff's stockholders, on the 8th day of May, 1869, unanimously adopted a resolution approving an agreement made by the Board of Directors to purchase for 5,500 shares of plaintiff's stock property of the Houston & Galveston Wharf & Press Company extending from the Bay front or said street called Avenue A to the channel between Thirty-first and Forty-first Streets. The 6,222 shares of stock of the City was voted for said resolution by its Mayor, J. A. McKee. At the same meeting another resolution was unanimously adopted by plaintiff's stockholders, the City's 6,222 shares voting therefor by its said Mayor, which authorized the directors of plaintiff to purchase from the Galveston City Com-

pany the property north of said Avenue A between Tenth and Fourteenth Streets to the channel of the Bay, and also the north one-half of Block 682 and the property north thereof to the channel. On the 13th day of May, 1869, the Houston & Galveston Wharf & Press Company conveyed by deed to plaintiff its property aforesaid and received in payment therefor 5,500 shares of the stock of plaintiff, which deed conveyed to the plaintiff all of the land in the area before described, including the land and ground which would be occupied by streets if there were any streets extending through or into such area to the channel or otherwise and conveyed all the wharf privileges on the channel in front of such area, *which deed was filed for record June 22nd, 1869, and recorded June 25th, 1869, in Book 2, Pages 10 and 11, Deed Records of said Galveston County.* (The words between the asterisks were inserted by amendment.) (R. 43.) On the 26th day of May, 1869, Galveston City Company conveyed by deed to plaintiff the land between the north half of Block 682 in the channel, and received therefor 2,000 shares of the capital stock of plaintiff. On the 3rd of November, 1869, plaintiff intervened in a suit pending in the District Court of Brazoria County, in which the Galveston City Company was plaintiff and the City of Galveston was defendant, and thereupon a decree was entered in said cause, vesting title in the Galveston City Company to north half of Block 682, and vesting title in plaintiff to the property between said block and the channel, and it was adjudged that the City of Galveston take nothing. By an act of the Legislature of the State of Texas, approved June 23rd, 1870, said compromise decree of April 1st, 1869, and said sale by the Houston and Galveston Wharf & Press Company to plaintiff. and said decree of November 3rd, 1869, were in all respects validated, ratified and confirmed, a copy of which Act is hereto annexed as a part hereof and marked Exhibit B. (R. 6-7.)

"That the Mayor, Aldermen and Inhabitants of the City of Galveston did not, in May, 1869, or at any time thereafter, request or demand the issuance to them or to the City of any additional shares of stock of the plaintiff, and from May, 1869, to this time the City has been paid dividends on its

stock, on approximately one-fourth of total stock issued, at the same rate and to the same extent only that dividends have been paid on the other shares of stock of plaintiff. Before declaring dividends there were deducted expenses of operation, taxes, interest on bonds, and other indebtedness, amounts placed in sinking fund for retiring bonds, expenditures for improvements, amounts necessary to pay indebtedness and all other legitimate charges or expenses. (R. 7.)

"That contiuously after May, 1869, and for more than ten years plaintiff had peaceful and adverse possession of said land purchased from the Houston and Galveston Wharf & Press Company, using and enjoying the same, having wharves, piers, railroad tracks and other improvements thereon. That in Galveston Wharf Company vs. City of Galveston, 63 Texas, page 14, on December 19th, 1884, the Supreme Court of Texas decided that the interest in the property owned by the Mayor, Aldermen and Inhabitants of the City was not subject to taxation, and that before paying dividends the plaintiff could deduct from the earnings the taxes payable upon the remainder of the property. Plaintiff construed this decision as not applying to the property west of Thirty-first Street, persistently claiming that the City had no interest therein, except as a stockholder. It continued to pay taxes on all of the property west of Thirty-first Street from 1869 to and including 1891, after which, apparently by a clerical error, in 1892, an undivided two-thirds of such property was assessed for taxes. On July 8th, 1886, the City Attorney rendered an opinion to the City that the City, or the inhabitants thereof, had no interest except as stockholders to said property west of Thirty-first Street, except that he claimed that the City owned streets extending through the same and the wharf privileges at the end of such streets, whereupon, on July 8th, 1886, the City Council adopted a resolution instructing the assessor to assess the entire property west of Thirty-first Street, except the ground claimed as streets. In August, 1889, special counsel, employed by the city to investigate its interest or that of its inhabitants in the property of plaintiff, rendered to the City opinions in effect that all stock issued to plaintiff had been lawfully issued, that plaintiff (the city) owned

an undivided interest in the entire property, including that west of Thirty-first Street, which was represented by 6,222 shares of stock on which the City or its inhabitants were entitled to dividends, the same as upon the other stock of plaintiff, except that he thought that the taxes payable on two-thirds of the property (he considering that one-third of the entire property was exempt from taxation) should not be deducted from the earnings until after the dividends payable on the City's stock had been computed, or, in other words, that all such taxes should be chargeable to and paid by the private stockholders, and stated that he did not regard the decision on this point aforesaid, in the Supreme Court, conclusive, and that if necessary the question should be again presented to the courts for a decision. On March 15th, 1904, plaintiff, in a written communication to the City, offered to pay taxes on all of the property west of Thirty-first Street, again claiming that the City had no interest therein, except as a stockholder. (R. 7-8.)

"On March 9th, 1905, the City, acting by its Mayor-President and its four Commissioners, subject to the approval of the Legislature of the State, executed an agreement with plaintiff, *which agreement was approved by M. E. Kleberg, then City Attorney* (the words between the asterisks added by Amendment, R. 44), a copy whereof is hereto attached as a part hereof, marked Exhibit C, which agreement was in all things ratified, approved and confirmed as an amendment, by an Act of the Legislature of Texas to the Charter of the City, which took effect April 15th, 1905, by which agreement of March 9th, 1905, plaintiff waived its claim for payment (overpayment) of taxes, with interest thereon, amounting to about $57,000.00, and agreed to pay the City $60,000.00 for drainage purposes, which was done, gave the City certain drainage rights through its property, admitted that the City owned an undivided one-third interest in the property situated between Thirty-first and Forty-first Streets, the same as in the property between Ninth and Thirty-first Streets, and it was agreed that said one-third of said Wharf Company's entire property owned by said City of Galveston as aforesaid shall be exempt from taxation, and said city shall be entitled to and shall receive dividends from said Galveston Wharf Company in the

same manner in which such dividends have heretofore been paid; that is, said city shall be entitled to and shall receive upon each of its sixty-two hundred and twenty-two shares (6,222) of stock the same amount of dividends as shall be paid by said Galveston Wharf Company on any other share of capital stock of said Wharf Company, all fixed charges and legitimate expenses of operating, maintaining, repairing and improving the entire property in the same manner as heretofore, including all taxes, interest and sinking funds that may be due or become due by said Wharf Company, to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest and sinking funds that may be due or become due by said Wharf Company, to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest, sinking funds and dividends being hereby admitted by said City to be correct; and said Galveston Wharf Company shall hold the title, subject to said City's one-third interest therein, to said entire property included in the territory north of Avenue A and between said Ninth and Forty-first Streets in the City of Galveston, including what would be the prolongations of all streets if opened through said property; and the control and management of the whole of said Wharf Company's property including said city's one-third interest therein to remain in said Wharf Company in the same manner as fixed by the before mentioned decree of the District Court of Brazoria County, Texas, and said decree and all the terms and provisions thereof shall remain in full force and undisturbed except insofar as the same may be changed by this contract and agreement. (R. 8-9.)

"That up to this time (the filing of said bill) said agreement of March 9th, 1905, has been fully performed. (R. 9.)

"That by an Act of the Legislature, approved August 4th, 1870, the Legislature authorized Plaintiff to construct and operate railroads, a copy of which Act is hereto attached as a part hereof and marked Exhibit D." (R. 9.)

Here follow allegations in the Bill to the effect that the alleged charter amendments attacked in this suit were submitted by said Board of Commissioners to a vote of the quali-

fied voters of the City of Galveston, at an election of said voters called for and held on the 4th day of May, 1920, said proposed amendments being submitted in the form of propositions numbered 7th, 8th, 9th and 25th, each proposing to amend the charter of the City of Galveston by adding thereto a new section to be numbered respectively 100, 101, 102 and 118, and each of which propositions with its proposed amendment were adopted by a majority of about 250 of the votes cast at said election. (R. 9.) Said propositions and the new sections engrafted upon the charter of the City of Galveston are fully set out in Appellant's Bill as follows:

SEVENTH PROPOSITION.

" 'Shall the existing charter of the City of Galveston be amended by adding thereto a new section, to be numbered No. 100 and to read and be as follows, to-wit:

Section 100. Ownership of Public Utilities, etc.—The City of Galveston shall have the power to acquire by purchase, lease, condemnation or otherwise and to buy, own, construct, establish, maintain, equip, regulate and operate, within or without the city limits and when so acquired, to lease, sell, convey, assign, transfer, pledge, mortgage and encumber the same or any part thereof, a system or systems of gas or electric lighting plant, dock and wharf, railway terminals, bridges, drawbridges, docks, wharves, ferries, ferry landings, loading and unloading devices and shipping facilities or any other public service or public utility and to demand and receive compensation for service furnished for private purposes or otherwise and to appropriate private and public property, within or without the city limits for such purpose, and to exercise whenever, and as often as, the Board of Commissioners shall deem it necessary, the right of eminent domain, for the appropriation of public and private lands, property, rights of way, or anything whatsoever that may be proper and necessary to efficiently carry out said objects, including the right, when so expressed, to take the fee in the lands, rights of way or property so condemned, which said powers shall include the power to condemn the whole or any part of the

property of any person, firm or corporation now conducting any such business, plant or system, including the property, real, personal and mixed, owned jointly by the Galveston Wharf Company and the City of Galveston, and in which said property the City of Galveston owns an undivided one-third interest, for the purpose of acquiring, establishing, constructing, owning, operating, equipping and maintaining any such public service or public utility, and for the purpose of distributing such service throughout the city or any portion thereof; provided, that in all cases where the city seeks to exercise the power of eminent domain as herein provided, it shall be controlled, as nearly as practicable, by the law governing the condemnation of property of railroad corporations in this state. the city taking the position of the railroad corporation in any such case; provided, that no lease, sale, conveyance, assignment, transfer, pledge, mortgage or encumbrance, of any public service or public utility hereinbefore mentioned, or any part thereof, shall be made under this section unless the same shall first have been submitted to, and authorized by, the vote of a majority of the qualified voters of said city voting at an election to be held exclusively for that purpose.' (R. 9-10.)

EIGHTH PROPOSITION.

" 'Shall the existing charter of the City of Galveston be amended by adding thereto a new section, to be numbered No. 101, and to read and be as follows, to-wit:

Section 101. Whenever the City of Galveston may determine to purchase or acquire any public service or public utility, the city may obtain funds for the purpose of purchasing or acquiring the same and paying the compensation therefor, by issuing bonds, notes or other evidence of indebtedness of said city, and shall secure the same by fixing a lien upon the said property constituting the said public service or public utility so acquired by condemnation, purchase or otherwise, and said security shall apply alone to the said property so pledged, and shall never be reckoned in determining the power of said city to issue bonds for any purpose authorized by law, and no judgment shall

ever be rendered against the city upon any such note, bond or other evidence of indebtedness, requiring the city to pay any specified sum of money, but said judgment shall be merely one of foreclosure, divesting and depriving the city of possession of the property so purchased and condemned, but not paid for, in which event the city shall forfeit and lose only the payments theretofore made without liability or judgment in any sum for the unpaid purchase price; provided, that the issuance of said bonds, notes or other evidence of indebtedness, and the management and control of such encumbered property shall be issued and governed, so far as applicable, in conformity with the provisions of Articles 772b, 772c, 772d, 772e, and 772f of Vernon's Sayles' Texas Civil Statutes of the State of Texas, 1914, and the acts amendatory thereof and supplemental thereto and provided, further, that any such bonds, notes or other evidence of indebtedness, issued as aforesaid, shall be exempt from taxation, and provided, further, that no purchase or expenditure shall be made under this section unless the same shall first have been submitted by the Board of Commissioners to a vote of the qualified voters of said city at an election to be held for that purpose.' (R. 10-11.)

NINTH PROPOSITION.

" 'Shall the existing charter of the City of Galveston be amended by adding thereto a new section to be numbered No. 102, and to read and be as follows, to-wit:

Section 102. In the event of the acquisition by the City of Galveston, by purchase or condemnation, of the property owned jointly by the City of Galveston and the Galveston Wharf Company, the City of Galveston shall, and it is hereby, authorized to, surrender to the Galveston Wharf Company, the stock of said corporation now owned and held by said city representing its interest in said property, and said city shall retain out of the purchase price of said property, or any part thereof, whether acquired by purchase or condemnation, its one-third interest therein, and the Galveston Wharf Company and the City of Galveston shall adjust any and all rights

relating to the payment of taxes, dividends, interest, bonds, sinking funds or other legal liabilities incurred by said Galveston Wharf Company in the management of said property, and any sum or sums of money found to be legally owing by the City of Galveston, by reason of the matters aforesaid, shall be paid out of such proceeds, and said city is also hereby authorized to invest the residue of such proceeds in the property so acquired, or expend all, or any part of the residue of such proceeds for the purpose of (a) paying and discharging its bonded indebtedness, or (b) raising the grade, building seawalls and breakwaters, and doing any and all other kinds of protective works in said city, either by itself, or in conjunction with either the State of Texas, County of Galveston, or the government of the United States, or (c) other public purposes and improvements, as may be determined by a majority of the qualified voters of said city voting at an election called for such purpose.' (R. 11-12.)

TWENTY-FIFTH PROPOSITION.

" 'Shall the existing charter of the City of Galveston be amended by adding thereto a new section to be numbered No. 118, to read and be as follows, to-wit:

Section 118. The City of Galveston shall have the power, and it is hereby authorized, to compel a partition and division of the property, real, personal and mixed, owned by the City of Galveston and the Galveston Wharf Company jointly, and to sell, convey, assign, transfer, pledge, mortgage or encumber the same, or any part thereof, when authorized by a majority of the qualified voters of said city voting at a special election called for such purpose, in favor of some clear and specific proposition therefor, and provided further, that the Board of Commissioners are authorized to institute and prosecute a suit for the partition of such property, as provided by the statutes of the State of Texas, and from time to time submit to the qualified voters of said city, at a special election called for the purpose, a proposition for the lease, sale, conveyance, assignment, transfer, pledge, mortgage and encumbrance of the whole or any part of the property hereinbefore mentioned,

and provided further, that the City of Galveston shall have the power, and it is hereby authorized to expend all, or any part of, the proceeds derived from the lease, sale or encumbrance, of said property or any part thereof, for the purpose of (a) paying and discharging its bonded indebtedness, or (b) raising the grade, building seawalls and breakwaters, and doing any and all other kinds of protective works in said city, either by itself, or in conjunction with either the State of Texas, County of Galveston or the government of the United States, or other public purposes or improvements, as may be determined by a majority of the qualified voters of said city voting at an election called for such purpose as hereinbefore provided; provided further, that in the event of a partition of said property, the City of Galveston is hereby authorized and empowered to surrender to the Galveston Wharf Company, the stock in said corporation, now owned and held by it as representing the undivided one-third interest of said city in said property.' (R. 12.)

Said Bill further alleged:

"That said Board of Commissioners have or will declare said amendments adopted, forming parts of the charter of said city. That plaintiff owns and holds the title to all the property hereinbefore described, vested in it by said decree of April 1st, 1869, by the other facts hereinbefore alleged, including said agrement of March 9th, 1905, and so owns and holds one-third thereof in trust for the benefit of the present and future inhabitants of the City of Galveston to pay over the dividends in proportion to the shares of stock representing the same to the said City to be by it used for the benefits of such present and future inhabitants of Galveston, which trust according to the express terms thereof, cannot be terminated or discharged, except by a sale of said one-third interest or the stock representing the same upon a vote of four-fifths of all of the qualified voters of said city in favor of some clear and specific proposition therefor, there being slight probability that such a vote will ever be had, and that subject to such trust plaintiff has the absolute ownership, control and dominion over all of said property perpetually, and that

the City of Galveston agreed in said decree of April 1st, 1869, and said contract of March 9th, 1905, which agreements were approved and ratified by the Legislature of the State, that plaintiff, subject to such trust, should own, hold, use, manage and enjoy said property, and that the attempted condemnation of said property or any part thereof under said seventh proposition, or attempted partition thereof under the said twenty-fifth proposition and attempting to sell one-third of said property or any part thereof, under said propositions or any of them, upon a majority only of the voters of said city, would impair the obligations of said contracts of April 1st, 1869 and March 9th, 1905, and deprive plaintiff of its property and property rights, of the right to control and manage all of said property, deprive it of its trust, without due process of law, contrary to the constitution of the United States, and same would so deprive the present and future inhabitants of said city of their property, property rights, cestuis que trust, of one-third of said property, and the stock representing the same, for that under said contracts the interest of said inhabitants can be disposed of only upon a vote of four-fifths of the qualified voters of the city, in favor of some clear and specific proposition therefor. That the said City of Galveston, having attempted to violate its duty in the premises to such inhabitants, plaintiff, as their trustee is entitled to represent and protect their interest in said property. (R. 12-13.)

"That plaintiff has not within forty years paid a dividend on stock exceeding 6% per annum, and its dividends have averaged only 4.358%, and that large sums of the earnings of said property which might have been applied to the payment of dividends and which, if so applied, would not have caused the dividends to have averaged more than reasonable dividends or returns on the value of the property, have been expended in the permanent improvement of the property, at least the sum of $2,592,815.77 having been so expended, and if said amounts had been expended in dividends the city would have received approximately one-fourth therof, and the private stockholders of plaintiff, the other three-fourths, while the same, having been expended in improvements

beneficial to the interest of the present and future inhabitants of said city in said property, said city has received the benefit of one-third instead of one-fourth of such earnings. That although the interest of said inhabitants in said property has not been subject to mortgage, except on a vote of four-fifths of the voters thereof, which has not been had, plaintiff has borrowed large sums of money and mortgaged its property, such mortgages being binding only on the interest of the private stockholders, and it now has outstanding bonds in the sum of $3,000,000.00 secured by such mortgages, and has accumulated a sinking fund in the sum of $902,000.00 for payment of such bonds, leaving the sum of $2,198,000.00 thereof for which there is no cash for the payment thereof. That if the right to partition such property did exist, in the partition thereof the equities above stated of the private stockholders should be provided for by requiring the city or the inhabitants therof in some form to compensate the plaintiff and stockholders for the expenditures so made, as aforesaid, in the improvement and corresponding increase in the value of the one-third of the property, which might be partitioned to the city or the inhabitants thereof, but that said proposition 25 makes no provision whatever for adjusting such equities, and that the same cannot be adjusted in a court of law. That all of said property has been improved, there being wharves, piers, warehouses, grain elevators, railroad tracks and other improvements thereon, from Tenth to Forty-First Streets, for use as an entirety, and that said property cannot be equitably partitioned in kind, so as to set apart one-third thereof with the improvements thereon of equal value to the other two-thirds; that said property cannot be so partitioned without injuring and damaging the value and utility thereof, all of which are now devoted to public use, and have been so devoted for many years, to a very large extent, and to the equivalent of a large sum of money. That now and for a number of years there have passed over the railroad tracks, wharves and piers of plaintiff very large tonnage of interstate and foreign commerce and some tonnage of state commerce, and that such will continue in the future. That

the service, rates and charges of plaintiff as to such interstate and foreign commerce are subject to the regulation and control of the Interstate Commerce Commission, and that such intrastate commerce is subject to the regulations and control of the Railroad Commission of Texas. Wherefore, a partition of said property would greatly impair and depreciate the value thereof as a whole or of such value of one-third thereof, or such value of two-thirds thereof (R. 12-14), *and would greatly depreciate the usefulness of the property by the public, especially by the shipping public, and would be contrary to public policy* (the words between the asterisks added by amendment, R. 44). (R. 13-14).

"That while said proposition 25 purports to authorize a partition of said property, it is evident from a reading thereof that the purpose thereof would be a sale of one-third of such property, authorized only by a majority vote of the voters of said city, which, as aforesaid, would impair the obligation of said contracts and rights of plaintiff, as owner and trustee for its own stockholders, as well as the present and future inhabitants of said city.

"That the publication of said amendments in March, 1920, and the agitation for the adoption thereof has impaired the value of the shares of its stockholders, some of which sold in January, 1920, for $85.00 per share, and since said publication and agitation have sold for $70.00 per share. That said amendments as purported parts of the charter of the City would be a cloud on the title of plaintiff to said property, depreciate the value thereof, depreciate the market value of the stock to its stockholders, damage and injure the credit of plaintiff, retard the development and improvement of said property, injure the beneficial interest of the present and future inhabitants of said city, of which plaintiff is trustee, be a constant threat and menace to the plaintiff in the ownership, enjoyment, holding and management of said property, and that unless restrained or enjoined, defendants will attempt to partition said property* * * * * * * which cannot be

done without great and irreparable damage and injury to plaintiff and the beneficiaries of its trust. (R. 14-15.)

"The City owns Pelican Island fronting immediately on the deep sea channel of Galveston Bay, much larger in area than the property held by plaintiff, much of which is at an elevation above storm waters, which is capable of improvements, docks, wharves and terminals. There is a large area on the Eastern end of Galveston Island fronting immediately on said deep sea channel owned by private parties larger in area than the property held by plaintiff, which can be improved by such wharves, docks and terminal facilities, and which will be protected by a seawall now under construction by the United States Government, and which will be completed in a few months. There are large areas of property susceptible of improvement for such purposes now unimproved, westward of the property held by plaintiff. Hence, if the city wishes to inaugurate municipal wharves it has ample opportunity to do so without undertaking to appropriate the property held by plaintiff, or any part therof. That the city has received in dividends in trust for its inhabitants $742,000 in excess of the additional amount of taxes which it would have received had taxes been paid on all of the property held by plaintiffs. That without cost to the city or contribution by it of one cent there have been expended in additions and improvements of the property since April 1st, 1869, the sum of $2,592,815.77. That under such circumstances it would be contrary to equity and good conscience to permit the City to condemn or appropriate the property held by plaintiff, or any part thereof. (R.15.)

"That plaintiff now is and has been since, 1869, in possession of all of the property hereinbefore described. (R.15).

Appellants, claiming that they were without adequate remedy under the rules of the common law, prayed for the issuance of a Writ of Subpoena to Defendants and that upon hearing said charter amendments insofar as they affect or attempt to affect Appellants, the property described in the Bill and the ownership thereof by plaintiff, Galveston Wharf Company, be cancelled and decreed to be void and the De-

fendant, City, and the other Defendants, and their successors in office, be perpetually enjoined from attempting to enforce said charter amendments by filing or prosecuting suit or suits, proceeding or proceedings for partition, condemnation, or in any other manner whatsoever against said plaintiff or against said property and from attempting to commit a breach of the trust imposed on it by the decree or contract of April 1, 1869, and the Act of the Legislature confirming the same, or by attempting in any manner to interfere with said plaintiff in its possession, control, ownership, or operation of said property, or attempting to acquire the same, or any part thereof, or partition the same, or attempting to dispose of the same, or any part thereof, or to interfere with the same in any way, except when authorized so to do by a vote of four-fifths of the qualified voters of said City in favor of some clear and specific proposition, etc. (R. 15-16.)

No doubt it may not be strictly necessary to set out in this place the exhibits attached to Appellant's Bill of Complaint and made part thereof, but it is believed that it will conduce to convenience to do so.

The decree of the District Court of Brazoria County, or contract, of April 1, 1869, a copy of which is attached to the Complaint, is as follows, to-wit:

"Exhibit A."

DECREE OF COMPROMISE.

THE MAYOR, ALDERMEN, and INHABITANTS OF THE CITY OF GALVESTON,

versus

THE GALVESTON WHARF COMPANY.

"This day the above cause came on to be heard, and leave is granted to both parties to amend their pleadings, and amendments were filed, and thereupon the parties announced themselves ready for trial, and waived a jury and submitted this cause to the Court, and further announced that the said parties, plaintiff and defendant, had agreed on the terms of a final settlement and compromise between said parties, and

that the same should be entered as the decree and judgment of the Court herein, all errors and exceptions thereto being waived and the terms of said judgment and decree appearing to the Court to be reasonable and fair and for the public interests involved: Thereupon, it is considered, ordered, adjudged and decreed by the Court, that the present capital stock of the Galveston Wharf Company, consisting of twelve thousand four hundred and forty four shares of stock of one hundred dollars per share, amounting in the aggregate to one million two hundred and forty four thousand four hundred dollars, shall be increased the full one-half thereof, viz. by six thousand two hundred and twenty-two shares of one hundred dollars each, amounting to the sum of six hundred and twenty-two thousand two hundred dollars, which said stock of said sum of six hundred and twenty-two thousand two hundred dollars shall be the property of the Mayor, Aldermen and Inhabitants of the City of Galveston, and the same shall stand and remain on the books of said company as the property of said Mayor, Aldermen and Inhabitants of the City of Galveston, and the equal, undivided one-third of the property of said Company, to be consolidated and vested in it by this decree, shall be owned by said City and represented by its said stock, and the said stock, and the rights and interests therein and in said property of said Mayor, Aldermen and Inhabitants of the City of Galveston, shall be in trust for the present and future inhabitants of the City of Galveston, and all and every part thereof shall be inalienable and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever, in any other manner than by the vote of four-fifths of all the qualified voters of said City in favor of some clear and specific proposition therefor. The dividends and net earnings of said stock shall be regularly paid to said Mayor, Aldermen and Inhabitants of the City of Galveston, to be disbursed and expended for the public good and benefit of said present and future inhabitants of said City; and that the said plaintiffs shall be represented by three Directors in the Board of Directors of said Company, one of whom shall be the Mayor of said City, who shall be one of the Committee on Finance; another shall be an Alderman of said

City, and the third shall be either an Alderman or a citizen of said City, both to be elected by the Common Council of said City. The other six Directors of said Company to be elected by the remaining stockholders of said Company exclusive of the stock of said City. And it is further expressly understood and agreed between the parties, and it is so ordered, adjudged and decreed, that in all the stockholders' meetings of said Company no measure shall be adopted, and no vote, act or proceeding shall be valid unless by a vote of three-fourths of all the stock of said Company exclusive of the said stock of the plaintiff. In consideration of all which, it is further agreed between the parties, and is now considered, ordered, adjudged and decreed by the Court that all the property, rights and claims of every kind and description (except certain lots and property hereinafter specified), of the said Galveston Wharf Company, and also all the right, title, interest and claim of every kind and description whatsoever, of the said Mayor, Aldermen and Inhabitants of the City of Galveston, in and to all the land and ground extending from the shore or ordinary highwater mark of the Island of Galveston to the channel of the bay or harbor, from and including the street known on the map and plan of said City of Galveston as Ninth Street, on the east, to and including the street known as Thirty-First Street on the west, including all the ground known as the Flats within said limits, and also all rights, capacity, powers and claims of said plaintiffs to build and erect wharves, and take and receive wharfage therefor, at the end of streets now or hereafter running or extending to said channel, be and the same are hereby vested in the said Galvston Consolidated Wharf Company, and to be henceforth the corporate property, right and title of the said Galveston Wharf Company, and owned, held, possessed, controlled, used and administered by said Company—all the said united and consolidated property, rights, and claims being represented by said aggregate of one million eight hundred and sixty-six thousand six hundred dollars—the original two-thirds thereof held by the present stockholders and one-third by the said plaintiff in trust as aforesaid. But it is further expressly

provided, declared and understood, by the parties, and is considered, ordered, adjudged and decreed by the Court, that the rights of said plaintiff in and to certain parts of said Flats intended hereby to become the future property of said Company, are now in litigation and controversy between said plaintiff and the Galveston City Company, or are denied by the said City Company and other parties, and also in controversy between plaintiff and A. H. Bean and others, in suit No. 2437, on the docket of this Court; and that this settlement and arrangement shall have no constructive operation or effect whatever to prevent the plaintiff herein from maintaining and continuing all the suits now pending or from instituting and prosecuting any and all other suits ecessary or proper to recover and enforce the right and claim of said plaintiff to all of said "Flats" or ground to which any adverse right is or shall be held or claimed by any and all other parties against said plaintiff, or against the Company herein united and consolidated; the recovery by the plaintiff in all suits now pending or hereafter brought, and all future title to any part of the said "Flats" in front of City of Galveston within the aforesaid limits, hereafter acquired in any manner by either party, to inure to the common benefit of the parties herein, and to the good faith, fulfillment and execution of this compromise and settlement.

It is further agreed between the parties, and is considered, ordered, adjudged and decreed by the Court, that the following property of said defendant, viz: all the lots, blocks and land now owned, held or claimed by said defendant, south of Avenue A, on the map or plan of said city; also, all the lots now owned or held by said Company in the south half of the following Blocks, viz: six lots in 734, three lots in 735, two lots in 736, two lots in 737; also, all the stocks in other companies held by said defendant; all the accounts, claims, debts and liabilities now due to or heretofore contracted to said defendant, and all its personal property not forming part of the wharves, shall not be included in the future property and rights to be held and owned by said Company jointly for plaintiffs and defendants as aforesaid, but that the same shall be withdrawn from said Company and forthwith conveyed

by said Company to a trustee or trustees to be named by it, and to be held or disposed of for the use and benefit of the stockholders of said Company prior to this compromise, as the holders of the original stock of said Company may direct. It is further the agreement and intention of the parties that this settlement shall, if practicable, result in and secure the final settlement of all controversy, and prevent future controversy in regard to all the wharf privileges in front of the City of Galveston, and that the whole of said wharf privileges shall be united and consolidated in the present parties hereto.

It is further agreed, considered, ordered, adjudged and decreed by the Court, that as the Galveston Wharf Company has assumed to pay all the expenses incident to the litigation hereby compromised they shall have the right to issue additional stock at their discretion, which may be held, pledged or paid out in order to raise the necessary funds to pay all expenses incurred in said litigation, or issue bonds or use the income and earnings of the said Wharf Company; to do the same after the issuance to the City of Galveston of the six thousand two hundred and twenty-two shares of stock, as aforesaid.

It is further agreed by the parties, and is ordered, adjudged and decreed by the Court, that the defendant shall pay all the costs in this suit incurred.

J. B. McFARLAND,

Judge of the First Judicial District of Texas."
(R. 17-20).

Here follows certificate of Clerk of the District Court of Brazoria County, Texas.

The Act of the Legislature confirming said decree or contract, attached to the Complaint as Exhibit B is as follows, to-wit:

"Exhibit B."

CONFIRMATION OF COMPROMISE.

"An Act to Confirm the Compromises and Settlements Between the Corporation of the City of Galveston, the Galveston City Company, the Houston and Galveston Wharf and Press Company, and the Galveston Wharf Company.

Whereas, On the 8th day of December, 1851, an act was passed by the Legislature entitled "An Act granting certain powers to the Corporation of Galveston City," and on the 16th day of February, 1852, an act was passed entitled: "An Act supplementary to an Act granting certain powers to the Corporation of Galveston City," approved December 8th, 1851; and, whereas, litigation in regard to the property known as the Flats, within the corporate limits of said City, existed for many years, retarding the improvement and prosperity of said City, which said litigation was compromised and settled by a consent decree rendered in the District Court of Brazoria County, on the first day of April, 1869, in a suit wherein the said Corporation of the City of Galveston was plaintiff and the Wharf Company was defendant, and by a further consent decree, rendered in said District Court, on the 2nd day of November, 1869, in a suit wherein the Galveston City Company was plaintiff, and the Corporation of the City of Galveston was defendant, and by a sale by the said Houston and Galveston Wharf and Press Company to the said Galveston Wharf Company, therefore,

Be it enacted by the Legislature of the State of Texas:

That the said compromises and settlements between said parties, and the said decrees of the District Court of Brazoria County, recited in the preamble hereto, are in all respects validated, ratified and confirmed; provided, however, that this Act shall not be so construed as to affect the right or claim of any person whatever not a party to said suits, decrees or compromises.

Approved June 23, 1870." (R. 20-21.)

Here follows certificate of Secretary of State.

The Act of the Legislature granting the Galveston Wharf Company the right to construct and operate railroads, attached to the Bill as Exhibit D is as follows, to-wit:

"Exhibit D.

GRANT FOR RAILROAD BY THE STATE LEGISLATURE.

An Act Granting to the Galveston Wharf Company the Right to Make Railroad Connection With Their Wharves and the Railroads Entering into City of Galveston.

Section I.

Be it enacted by the Legislature of the State of Texas.

That the Galveston Wharf Company shall have the right to construct, own, and operate a railroad, commencing at, or near the present terminus or Depot of the Galveston, Houston & Henderson Railroad, and running thence to the New Wharf owned by said Company, and thence along Avenue A until it has crossed Bean's Wharf, and thence along Avenue A, or a line to the North thereof, to the east end of Galveston Island, and to cross all streets and alleys on the route of such railroad, and to build switches from the track of said railroad to each of the wharves of said Company; provided, that whenever said Railroad crosses Bean's Wharf on Avenue A, it shall run switches, turnouts, side switches, etc., to the T head thereof, if requested by the owners of said wharves, and shall furnish all necessary and proper rolling stock upon said switches at Bean's Wharf, to enable said wharf to receive with dispatch all articles shipped to said wharf, or coming to said wharf for shipment, and to load and transport all articles landed at said wharf, and shall deliver and remove the same with the same dispatch and upon the same terms and conditions that articles are received, taken and removed from any other switch at any other wharf along the line of said road; and in case it should be necessary to run across any private property for the construction of said railroad, the said Company shall have the right to appropriate and condemn the same on payment of the fair value thereof, by agreement with the owner or owners, or in conformity with the general railroad law of this State.

Section II.

That said Company shall have the right to make connection with the Galveston, Houston & Henderson Railroad in case of any change in the terminus or depot of said railroad, and with any and all other railroads which may at any future time, enter the City of Galveston.

Section III.

That said Company shall have the right to carry and transport persons and freight on said railroad, and charge and receive reasonable compensation therefor, and to run their cars over any connecting railroad, in accordance with the general railroad law of the State.

Section IV.

That this Act take effect and be in force from and after its pasage.

Passed August 4, 1870." (R. 21-22).

Here follows certificate of Secretary of State.

The contract of March 9, 1905, the resolutions of the Board of Commissioners of the City of Galveston and of the Board of Directors of the Galveston Wharf Company authorizing, making and entering into the same and that portion of the Act of the Legislature of the State of Texas approving and confirming said contract as an amendment to and part of the charter of said City, attached to said Bill as Exhibit "C" appear at pages 22-29 of the record, said contract and said confirmatory act of the Legislature being as follows, to-wit:

"Sec. 78a. That a certain agreement and contract of settlement, adjustment and compromise entered into by and between the City of Galveston and the Galveston Wharf Company, bearing date the 9th day of March, 1905, be and the same is hereby in all things ratified, approved and confirmed, a substantial copy of which said agreement and contract is as follows:

STATE OF TEXAS,

County of Galveston:

Know all men by these presents:

That to finally settle the question of the apportionment of dividends to which the City of Galveston is and shall be entitled from the Galveston Wharf Company, and to finally compromise, settle and adjust all matters of difference and controversy, and all pending suits between said City of Galveston and said Galveston Wharf Company, the said City of Galveston, a body corporate and politic, and the said Galveston Wharf Company, a corporation duly incorporated under and by virtue of the laws of the State of Texas, having its domicile and principal office and place of business in the city and county of Galveston, Texas, have mutually contracted and agreed to and with each other, and do hereby mutually contract and agree to and with each other, as follows:

1. Said Galveston Wharf Company shall pay to said City of Galveston sixty thousand dollars ($60,000) as follows: Ten thousand dollars ($10,000) each year for three consecutive years and the balance of said total sum of sixty thousand dollars ($60,000) each, in five annual payments of six thousand dollars ($6,000) each, the payment of the first ten thousand dollars ($10,000) to be made on the first day of November, 1905, and the remaining payments to be made on the first day of November of each consecutive year thereafter until the whole of the said sum of sixty thousand dollars ($60,000) shall have been paid, the said sum or an equivalent amount to be expended by said City of Galveston for drainage purposes in said city.

2. Said Galveston Wharf Company shall, as soon as this contract and agreement takes effect, dismiss its suit against said City of Galveston to recover overpayments of Taxes, pending in the District Court of Galveston County, numbered on the docket of said court 12,796, involving, in round numbers, with interest, about fifty-seven thousand dollars ($57,000), and said Galveston Wharf Company shall pay all court costs of said suit.

3. Said Galveston Wharf Company shall, as soon as this contract and agreement takes effect, pay to the said City of

Galveston the sum of two thousand dollars ($2,000), and said City of Galveston shall receive said sum in full settlement of said city's claim against said Galveston Wharf Company for fire protection involved in cause No. 22,321, now pending in the District Court of Galveston County, Texas, and said Galveston Wharf Company shall dismiss its petition in said cause, and said City of Galveston shall dismiss its cross action or plea in reconvention in said cause, and said City of Galveston shall have the right to make a charge against said Galveston Wharf Company, from and after the dismissal of said cause, for the protection, according to rates to be fixed by the Board of Commissioners of the City of Galveston or other government of said city, said rate, however, not to exceed forty cents per annum per thousand square feet of area occupied by said Galveston Wharf Company's sheds protected, said charge for fire protection only so long as said City of Galveston makes and enforces charges for fire protection against other persons or corporations for similar protection.

4. Said Galveston Wharf Company shall admit and recognize that, by virtue of the hereinafter mentioned decree, said City of Galveston owns an undivided one-third interest in all the property of the said Galveston Wharf Company situated between Thirty-first street and Forty-first street north of Avenue A, in said City of Galveston, including what would be the prolongation of Thirty-first street and Fortyy-first street, and all of intervening streets, if the same were opened, in the same manner as the said city's one-third interest is now recognized and established in the property of said Galveston Wharf Company situated in said City of Galveston between Ninth and Thirty-first streets north of Avenue A by the decree entered in the District Court of Brazoria County, Texas, on the first day of April, 1869, in a suit by said City of Galveston against said Galveston Wharf Company, which said decree was duly ratified and confirmed by an Act of the Legislature of the State of Texas, approved June 23, 1870, and said city's one-third interest in all of the said property of said Galveston Wharf Company between Ninth street and Forty-first street north of Avenue A, in said City of Galveston, shall be represented by said city's sixty-two hundred and twenty-

two (62,222) shares of stock owned by said city in said Galveston Wharf Company.

5. Said City of Galveston shall have the right to open and construct drains and sewers and combination drains and sewers to the channel of Galveston Bay, through and across any of said Wharf Company's property at such places between said Ninth and Forty-First streets as may be necessary, and the right of way and permission for that purpose is hereby granted by said Galveston Wharf Company to said City of Galveston, and said Galveston Wharf Company hereby releases any claim for compensation or damages against city for the taking, use, construction and continuous maintenance of such drains, sewers and combination drains and sewers, and all such drains, sewers and combination drains and sewers so opened and constructed shall extend to the channel of Galveston Bay; Provided, however, that if said city desires to construct any such drain (not a sewer nor combination drain and sewer) so as to empty into slip instead of the channel of the bay, said city shall first obtain written consent from said Galveston Wharf Company so to do, and if such consent is refused by said Galveston Wharf Company, nothing in this contract shall be construed to prevent said city from exercising any right of eminent domain it may have or acquire; and said city shall open and construct, at its own expense, all such drains, sewers and combination drains and sewers, through or across said Galveston Wharf Company's property, and the location of all such drains, sewers and combination drains and sewers shall be agreed upon between the City Engineer of said city and the superintendent of said Wharf Company, and in case they cannot agree upon such location they shall select a third person, and the majority of the three shall select a location, but this agreement shall not be construed to impair said city's right of eminent domain. Said Galveston Wharf Company shall not be held liable for and is hereby released from liability for any damage or injury that may be done to said drains or sewers or combination drains and sewers by the construction of said Galveston Wharf Company of improvements upon its property or the operation or use of its said property for its ordinary business; provided, that if said Wharf Company shall con-

struct any building, shed or permanent structure upon its said property any damage to any such drains or sewers or combination drains and sewers caused by said construction shall be promptly repaired by said Wharf Company at its own expense, or said drains or sewers or combination drains and sewers shall be, at the expense of said Wharf Company, promptly adjusted or arranged so as not to impair the efficiency thereof; and provided that said city shall, at its own expense, promptly, and to the satisfaction of said Wharf Company, restore any and all property of said Wharf Company in any manner disarranged, disturbed or injured by or as the result of the construction by said city of any such drains or sewers or combination drains and sewers through or across said Wharf Company's property, to the same or as good condition as said property was in before such disarrangement, disturbance or injury.

6. Said Galveston Wharf Company shall be and hereby is released from any obligation to open any drains at its own expense and cost through or across any of its said property between said Ninth and Forty-first streets in said City of Galveston, and said Wharf Company shall have and is hereby granted the right and privilege, subject to the supervision of the city engineer of said city, to connect without charge any drains of its own with the drains or sewers or combination drains and sewers that may be constructed and maintained by said city through or across said Wharf Company's property; and said one-third of said Wharf Company's entire property owned by said City of Galveston as aforesaid shall be exempt from taxation, and said city shall be entitled to and shall receive dividends from said Galveston Wharf Company in the same manner in which such dividends have heretofore been paid; that is, said city shall be entitled to and shall receive upon each of its sixty-two hundred and twenty-two (6,222) shares of stock the same amount of dividends as shall be paid by said Galveston Wharf Company on any other share of capital stock of said Wharf Company, all fixed charges and legitimate expenses of operating, maintaining, repairing and improving the entire property in the same manner as heretofore, including all taxes, interest and sinking funds that may be due

or become due by said Wharf Company, to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest, sinking funds and dividends being hereby admitted by said city to be correct; and said Galveston Wharf Company shall hold the title, subject to said city's one-third interest therein, to said entire property included in the territory north of Avenue A and between said Ninth and Forty-first streets in the City of Galveston, including what would be the prolongation of all streets if opened through said property; and the control and management of the whole of said Wharf Company's property, including said city's one-third interest therein to remain in said Wharf Company in the same manner as fixed by the before-mentioned decree of the District Court of Brazoria County, Texas, and said decree and all the terms and provisions thereof shall remain in full force and undisturbed except in so far as the same may be changed by this contract and agreement.

7. This contract and agreement shall take effect and become binding upon the respective parties hereto when the same shall have been confirmed and ratified by an Act of the Legislature of the State of Texas, and when such Act shall have taken effect and not before.

In Testimony Whereof, said City of Galveston has caused these presents to be executed for it and on its behalf by the Mayor-President, and attested by the Secretary of the Board of Commissioners of said City of Galveston, and the corporate seal of the city hereto affixed in accordance with and by virtue of a resolution of the Board of Commissioners of said City of Galveston, adopted at the meeting of said Board of Commissioners held in the City of Galveston, Texas, on the ninth day of March, A. D. 1905, a certified copy — which is hereto attached and marked for identification "Exhibit A", and made a part hereof; and said Galveston Wharf Company has caused these presents to be executed for it and on its behalf by its president and attested by its secretary, and the corporate seal of said Galveston Wharf Company hereto affixed, in accordance with and by virtue of a resolution of the board of directors of said Galveston Wharf Company, adopted at the meeting of said board of directors held at the office of said Gal-

veston Wharf Company in the City of Galveston, Texas, on the ninth day of March, A. D. 1905, a certified copy of which resolution is hereto attached and marked for identification "Exhibit B", and made a part hereof.

Executed in duplicate at Galveston, Texas, on the ninth day of March, A. D. 1905," (R. 23-27), followed by signatures, seals and certified copies of resolutions of Board of Commissioners of City of Galveston and Board of Directors of Galveston Wharf Company authorizing the execution of the contract.

Plaintiff's said supplemental bill filed on November 5, 1920 (R. 48-53), which was adopted by the intervenors (R. 53-54), alleged, in addition to the matters of estoppel alleged in its original complaint, the following:

"In addition to the matters of estoppel alleged in plaintiff's original bill of complaint, the City of Galveston is estopped from denying the validity, enforceability or constitutionality of the compromise decree entered in the District Court of Brazoria County April 1st, 1869, or the Act of the Legislature of the State of Texas, approved June 23, 1870, confirming the same, both of which are alleged and plead in plaintiff's original bill of complaint, or that any election was held authorizing said compromise decree, or contract, and is estopped from partitioning * * * * * * plaintiff's property for that:

"(a) In a certain suit instituted by plaintiff in the District Court of Galveston County, Texas, against said City of Galveston, on or about the 31st day of July, 1882, to enjoin the collection by said City of Galveston of taxes upon more than two thirds of plaintiff's property East of Thirty-first Street upon the ground that under and by virtue of said compromise decree the other one-third thereof was held by the City in trust for the then present and future inhabitants of the City of Galveston solely for public purposes, and was exempt from and not subject to taxation, said City defended, affirming the validity of said compromise decree and Legislative Act and claimed that the character of its ownership of or interest in one-third of the property as fixed and established by said

compromise decree was such that said one-third was not exempt from taxation, the contentions of plaintiff in said cause being sustained by the Supreme Court of Texas in Galveston Wharf Company vs. City of Galveston, 63 Texas, page 14, on December 19, 1884. (R. 48-49.)

"(b) In a certain suit filed in the United States Circuit Court for the Eastern District of Texas at Galveston on or about June 9, 1879, numbered on the docket of said court ..... Hitchcock & Co., holders of a judgment against said City of Galveston for $117,550, alleging that the City of Galveston was a stockholder in the Galveston Wharf Company, and was receiving dividends upon its stock therein, sued out a Writ of Garnishment against said Galveston Wharf Company, this plaintiff, as garnishee of said City, commanding said garnishee to answer what number of shares of its capital stock was owned by the City, which Writ of Garnishment having been duly served upon the garnishee, said garnishee, this plaintiff, by the directions and instructions of said City of Galveston pursuant to resolutions adopted by its City Council, answered in said cause for said City and for its benefit, and in accordance with said directions and instructions, that under and by virtue of said compromise decree and confirmatory legislative act, said Galveston Wharf Company had issued to, and there was held by the City of Galveston 6,222 shares of the capital stock of said Galveston Wharf Company, in trust for the then present and the future inhabitants of said City, and that under and by virtue of said compromise decree and confirmatory legislative act said shares of stock and the dividends thereon were exempt from and not subject to said Writ of Garnishment, and it was so found and adjudged by the Court in said cause. (R. 49.)

"(c) That while said suit was pending and prior to the final decision thereof, this plaintiff declined to pay to said City the dividends accruing upon said 6,222 shares of its capital stock, and said City of Galveston, affirming and relying upon the validity of said compromise decree and confirmatory legislative act, in pursuance of resolutions adopted by its City Council, filed its suit in the District Court of Galveston County, Texas, on or about the 10th day of August, 1880,

numbered on the docket of said court ....., against this plaintiff and Hitchcock & Co., seeking to recover against this plaintiff judgment for the amount of said dividends, basing its claim upon its rights under and by virtue of said compromise decree and confirmatory legislative act and asserting the validity thereof; (R. 50.)

"(d) That contiuously since the date of said compromise decree said City of Galveston has retained said 6,222 shares of the capital stock of plaintiff issued to it as aforesaid and as alleged in plaintiff's original bill of complaint herein, and has actively participated in the management of said Galveston Wharf Company through directors selected by it as provided by the terms of said compromise decree, the Mayor of said City being at all times ex officio one of said directors and a member of said Galveston Wharf Company's finance committee; (R. 50.)

"(e) That during all said time plaintiff, without objection or protest of any kind by said City of Galveston, but on the contrary with its consent and with its active co-operation, participation and concurrence through its directors aforesaid, has authorized and incurred the expenditure of and has expended millions of dollars of money taken from its earnings in purchasing additions to the property, in developing, improving and placing permanent improvements upon the property involved in this suit, including developments of and improvements placed upon such additions, when if such money so expended had been paid out in dividends to its stockholders, including said City of Galveston, approximately three-fourths thereof would have gone to its individual stockholders and one-fourth to said City, whereas the value of such additions and of the developments and improvements so made accrued one-third to said City of Galveston and two-thirds to its individual stockholders; (R. 50.)

"(f) That a very large and expensive part of said developments and improvements has been so made and placed in and upon parts of said property that would be occupied by streets of the City of Galveston were streets opened upon or through said property, so that if said compromise decree be held invalid and the parties placed in their original positions as the

same existed prior to the date of said compromise decree, said part of such developments and improvements would stand in and upon streets of said City. (R. 50.)

"(g) That during all said time Galveston Wharf Company, through its board of directors, including the directors representing said City of Galveston as aforesaid, has regularly during each year declared dividends upon its capital stock payable to its stockholders, including said City of Galveston, and said City had at all times, without protest or objection of any kind, regularly collected and received the dividends so declared upon said 6,222 schares of said stock, issued to it in pursuance to said compromise decree and confirmatory legislative act, and has always retained and still retains all said dividends, and has at all times accepted and received, and retained and still retains, all the benefits accruing to it under and by virtue of said compromise decree and confirmatory act; (R. 50-51.)

"(h) That between July 7th, 1869, when the Constitution of 1866 and Ordinance 10 ceased to exist, and June 23d, 1870, the date of the approval of the Act of the Legislature confirming said compromise decree of April 1st, 1869, said City of Galveston, by and through its directors designated as provided in said compromise decree, actively participated in the management of said Galveston Wharf Company and its affairs at meetings of the Board of Directors of said Company held on six several occasions, to-wit: December 15th and 23d, 1869, and January 8th, March 16th, April 14th and May 21st, 1870, and within said period said City of Galveston collected and received from plaintiff seven separate dividends upon said 6,222 shares of its capital stock, thus after Ordinance 10 ceased to be effective, affirming and re-affirming said compromise decree and agreement, in effect renewing the same, which thus reaffirmed and renewed was confirmed by the Legislative Act of June 23d, 1870, when there were no constitutional provisions, restrictions or limitations with which said compromise decree or said confirmatory act could in any wise conflict. At five of said directors' meetings the Mayor of said City was one of the City's directors present and participating. (R.51.)

"(i) That during all said time, to-wit: ever since the date

of said compromise decree, said City of Galveston has assessed, levied and collected taxes upon plaintiff's property as alleged in plaintiff's original bill of complaint herein. (R. 51.)

"(j) That during all said time, to-wit: ever since the date of said compromise decree, said City of Galveston, well knowing many purchasers were innocently purchasing and would purchase shares of plaintiff's capital stock, in ignorance that said City of Galveston claimed or would ever claim any right to partition or condemn plaintiff's property, or that it questioned or would ever question the validity of said compromise decree and confirmatory act of the legislature, or that it claimed or would ever claim any right whatever superior to the rights of all other holders of plaintiff's capital stock, stood silent and permitted such purchasers to purchase such shares of stock paying valuable considerations therefor. (R. 51.)

"(k) In compliance with said contract of March 9th, 1905, ratified, approved and confirmed by the act of the Legislature of the State of Texas, which took effect April 15th, 1905, both plead and alleged in plaintiff's original bill of complaint herein, said plaintiff has waived and abandoned its claim for $57,000 overpayment of taxes (principal and interest) and dismissed its suit seeking to recover the same, and has paid to said City of Galveston the $60,000 for drainage purposes and the $2,000 fire protection claim provided to be paid by said contract, and has up to this time in every respect and particular fully performed said contract, and said City of Galveston by entering into said contract and requesting the Legislature of Texas to approve and ratify the same, as well as by the express terms thereof, re-affirmed said compromise decree and the Act of the Legislature confirming the same and reasserted the validity thereof, by reason of all which said City is estopped from denying not only the validity of said compromise decree and said confirmatory act of the Legislature, but also said contract of March 9th, 1905, and the Act of the Legislature ratifying and confirming the same. (R. 51-52.)

"That if the City of Galveston ever had any right to partition or condemn plaintiff's property, which is not admitted but denied, it has long since lost any such right or pretended right by laches by reason of the acts and omissions, matters

and things, alleged in the preceding paragraph, and the various sub-paragraphs thereof, and by reason of its acts and omissions with respect to the reports of its City Attorney made in 1886, and of its Special Counsel made in 1899, as alleged in plaintiff's original bill of complaint, and by entering into the contract of 1905 alleged in said original bill of complaint, affirming the validity of said compromise decree and confirmatory legislative act, and requesting the Legislature of the State of Texas to ratify said contract, and neglecting and failing for more than fifty years to assert or attempt to enforce in any manner whatsoever its pretended rights of partition and condemnation, and upon the same facts is estopped from questioning the validity of said compromise decree and confirmatory act.

APPELLANTS' SPECIFICATIONS AND ASSIGNMENT OF ERRORS IS AS FOLLOWS:

I.

This Honorable Court erred in finding and holding that no Federal question is raised in the bill of complaint and other pleadings of Complainant and Intervenors.

II.

This Honorable Court erred in dismissing this cause and the bill of complaint and intervening petitions and other pleadings of Complainant and Intervenors for want of jurisdiction thereof in this court.

III.

This Honorable Court erred in holding that the bill of complaint herein, the supplemental bill of complaint, and the replications of Complainant fail to raise a Federal question and fail to show a cause within the jurisdiction of this court, and erred in dismissing this cause as to said Complainant for want of jurisdiction.

IV.

This Honorable Court erred in holding that the intervening petitions of Intervenors, the supplemental intervening petitions and the replications of Intervenors fail to raise a Federal question and fail to show a cause within the jurisdiction of this

court, and erred in dismissing this cause as to said Intervenors for want of jurisdiction. (R. 58-59.)

All the Appellants having duly filed their petition for appeal (R. 57-58) and specifications and assignments of error (R. 58-59) said appeal was duly allowed (R. 59-60), the required appeal bond duly filed (R.62-64), citation on appeal duly issued and service thereof accepted (R. 64-65), and this case is before this Court for review of the decree of the Court below dismissing the same for want of jurisdiction.

BRIEF OF ARGUMENT.

All Appellant's specifications and assignments of error complain, in slightly varying forms, of the same and single error, to-wit: the error of the court below in dismissing the case for want of jurisdiction on the ground that the Appellants' pleadings do not raise any Federal question and they will all be considered together.

Although the Appellants' pleadings attack the Charter Amendment undertaking to confer upon the City of Galveston the power of eminent domain over the property involved in this litigation, we shall not discuss that amendment, except, perhaps, incidentally, and shall confine ourselves to consideration of those phases of the case which concern the equity jurisdiction of the Federal Court under the contract and due process clauses of the Federal Constitution, the protection of which Appellants invoke to prevent the impairment of the obligations of the contract and decree of 1869, and the contract of 1905, and the taking of Appellants' property without due process of law, which would result from the enforcement of said amendments, and particularly that adopted as an additional section to the Charter of the City of Galveston numbered 118, purporting to authorize a compulsory partition of said property, and the institution and prosecution of a suit for such partition, "As provided by the Statutes of the State of Texas," and the lease, sale, conveyance, assignment, transfer, pledge, mortgage and encumbrance, "Of said property or any part thereof," by a majority vote of the qualified voters of said City, because, if it be determined that Appel-

lants' pleadings raise any Federal question whatever, the Court will take jurisdiction of and decide every question presented whether arising under State Law or otherwise.

The case was not dismissed in the Court below for want of equity in Appellants' pleadings, unless, which we do not think possible, such a finding is reasonably deducible from the Court's finding that Appellants' pleadings do not raise any Federal question, which was the specific reason given for the dismissal. We think, however, that some discussion of equities disclosed by Appellants' pleadings is appropriate at this point.

BASES FOR THE EXERCISE BY THE FEDERAL COURT OF ITS EQUITY JURISDICTION HEREIN: PREVENTION OF THE IMPAIRMENT OF THE OBLIGATIONS OF THE CONTRACTS PLEADED BY APPELLANTS AND OF THE TAKING OF APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW; ENFORCEMENT OF THE TRUST CREATED BY THE DECREE AND CONTRACT OF 1869 AND RECOGNIZED AND CONTINUED BY THE CONTRACT OF 1905 AND PREVENTION OF THE VIOLATION AND DESTRUCTION OF SAID TRUST; CLOUDING APPELLANTS' TITLE BY THE CHARTER AMENDMENT PROVIDING COMPULSORY PARTITION.

Assuming that Appellants' pleadings state a case for equitable relief, the averment that the enforcement of said charter amendments would impair the obligations of the contracts between the Appellant, Wharf Company, and the City, raises a Federal question and confers jurisdiction on the court. Hamilton Gas Light Company vs. Hamilton City, 146 U. S. 258; Home Telephone Company vs. Los Angeles, 227 U. S. 278, and other cases cited in 4 Federal Statutes Annotated, 907, et. seq.; City of Mitchell vs. Dakota Telegraph Company, 246 U. S. 396; Knoxville Water Company vs. Knoxville, 200 U. S. 22; Columbus Railway & Power Company vs. Columbus, 249 U. S. 399.

The averment that the enforcement of the amendments would deprive appellants of their property and property rights without due process of law also raises a Federal question and confers jurisdiction. Cuyahoga River Power Company vs. City of Akron, 240 U. S. 462.

Where the court has jurisdiction it can and will decide all questions arising under the state law involved in the litigation, although the court may not find it necessary to decide the Federal question which gave jurisdiction, Siler vs. L. & N. R. R. Co., 213 U. S. 191; Green vs. L. & I. Railroad Company, 244 U. S. 499, or may decide the Federal question against the party raising it.

A Federal Court of Equity having acquired jurisdiction on any ground will retain it for the purpose of furnishing full and complete relief to the parties. McGowan vs. Parish, 237 U. S. 285, 292.

"The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal. 'But a court of equity ought to do justice, completely, and not by halves;' and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. Camp vs. Boyd, 229 U. S. 531, 551-552, and cases cited."

"A court of equity ought to do justice completely, and not by halves. Decker vs. Caskey, 1 N. J. Eq. 427, 433; Williams vs. Winans, 22 N. J. Eq. 573, 577; Knight vs. Knight, 2 Eq. Cas. Abr, 169, pl. 25; S. C., 24 Eng. Rep. 1088, 1089; Story Eq. Pl., Sections 72, 174."

The court has the same equity jurisdiction as was possessed by the English Court of Chancery at the time the Judiciary Act was adopted in 1789, affected in no way by state legislation or changes in the jurisdiction of state courts. The first case on this subject is Robinson vs. Campbell, 3 Wheaton, 212, where the court said:

"There is a more general view of this subject, which deserves consideration. By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at comon law and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the Judiciary Act of 1789, it is provided, that the laws of the several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of May 8, s. 2, 1792, confirms the modes of proceeding in suits at common law in the courts of the United States, and declares that the modes of proceeding in suits of equity shall be 'according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of congress, by these provisions, to confine the courts of the United States in their modes of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention to give the party relief at law, where the practice of the state courts would give it, and relief in equity only, when, according to such practice, a plain, adequate, and complete remedy could not be had at law. In some states in the Union, no court of chancery exists to administer equitable relief. In some of those states, courts of law recognize and enforce in suits at law, all the equitable claims, and rights, which a court of equity would recognize and enforce; in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, think that to effectuate the purposes of the legislature, the remedies in the courts of the United

States are to be, at comon law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

In Noonan vs. Lee, 2nd Black, 509, the court said:

"The equity jurisdiction of the Courts of the United States is derived from the Constitution and Laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation. Neves vs. Scott, 13 How., 270; Boyle vs. Zacharie and Turner, 6 Pet. 658; Robinson vs. Campbell, 3 Wheat., 323."

Other earlier cases on this subject are Fitch vs. Creighton, 24 How., 159; Pennsylvania vs. Wheeling & Belmont Bridge Company, 13 Howard, 518; Thompson vs. Railroad Company, 6 Wallace, 134; Boyle vs. Zacharie, 6 Peters, 658; United States vs. Howland & Allen, 4 Wheaton, 114; Neves vs. Scott,13 Howard, 272. Later cases are Payne vs. Hook, 74 U. S. 425; Whitehead vs. Shattuck, 138 U. S. 146; Smyth vs. Ames, 169 U. S. 466; Smith vs. Reeves, 178 U. S. 443-444; McConihay vs. Wright, 121 U. S. 201. In the last named case the court said:

"Admitting this, (that under a State Statute an action of ejectment will lie against one claiming title to land, though not in possession) to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills quia timet, such as the present, belong to the ancient jurisdiction in equity, and

no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress."

In Smith vs. Reeves, supra, the court said:

"Smyth vs. Ames was a suit in the Circuit Court of the United States against the members of the State Board of Transportation of Nebraska and other persons and corporations, to enjoin the enforcement of certain rates established by a statute of that state for railroads. In that case it was insisted that the relief sought could only be had in an action brought in the Supreme Court of Nebraska, such being the remedy provided by the statute there in question. That provision, it was contended, took from the Circuit Court of the United States its equity jurisdiction in respect of the rates prescribed, and required the dismissal of the bills. This court said: 'We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which such suit may be brought. One who is entitled to sue in the Federal Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the Circuit Courts of the United States. Case of Broderick's Will, 21 Wall, 503, 520; Holland vs. Challen, 110 U. S. 15, 24; Dick vs. Foraker, 155 U. S. 404, 415; Bardon vs. Land and River Improv. Co., 157 U. S. 327, 330; Rich vs. Braxton, 158 U. S. 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff, the required value being in dis-

pute, may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. Payne vs. Hook, 7 Wall. 425, 430; McConihay vs. Wright, 121 U. S. 201, 205." (178 I. C. S. 443-444.)

In Boyle vs. Zacharie, supra, the court said:

"The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe. Robinson vs. Campbell, 3 Wheat. 212; United States vs. Howland, 4 Ibid. 108. So that, in this view of the matter, the effect of the injunction granted by the Circuit Court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the state of Maryland." (6 Pet. 658-659.)

In United States vs. Howland, supra, the court said:

"On the first point, no difficulty would be found, had the proper parties been before the court. A trust exists, and an account would be proper, to ascertain the sum due from Howland & Allen to Shoemaker & Travers. The case, even independent of these circumstances, would be proper for a court of chancery, but for the act of Massachusetts, which allows a creditor to sue the debtor of his debtor. Still, the remedy in chancery, where all parties may be brought before

the court, is more complete and adequate, as the sum actually due may be, there, in such cases, ascertained with more certainty and facility; and as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." (4 Wheat. 115.)

The contract of 1905 between Appellant, Galveston Wharf Company, and the City, ratified by the Legislature, (R. 23-29), which it was supposed would forever settle all controversies, conceded the City's contention that the property between Thirty-first and Forty-first streets was subject to the terms of the Compromise decree of April 1st, 1869. There can be no question but that the document of 1905 was a contract, and it does not purport to be anything else. (R. 17-27.) The Decree of 1869, while aproved by and entered as a Decree of the Court, shows on its face that it was in fact a contract of settlement between the plaintiff and the City, perpetuated in the form of a court decree. (R. 17-20.) As this Court has for many years held that an Act of the Legislature granting a charter or other rights to a private corporation is a contract within the meaning of the Federal Constitution, there can be no doubt that a document, although called a Decree, which appears on its face to be a contract and contains all the essentials of one, being approved by the Legislature as such, is a contract within the meaning of the Federal Constitution.

In determining whether this is a case of equitable cognizance, we are indeed fortunate in having a construction of the Decree of 1869 by that great jurist, Justice Stayton, Galveston Wharf Company vs. City of Galveston, 63 Texas, 14. After quoting the material parts of the Decree he said:

"The last part of the decree, above set out, evidences the fact that it was intended to consolidate and to put into the hands of the Galveston Wharf Company all of the wharf privileges possessed by both or either of the contesting parties; and that this was done, both parties agree; but it is claimed by the one that all the property vested, by the de-

cree, absolutely in the wharf company; and by the other, that one-third of the entire consolidated property, not excepted from the operation of the decree, vested in the City of Galveston, subject only to the use and control by the Wharf Company for the purposes for which the consolidation was made.

"The latter part of the decree, in terms, vests in the "Galveston Consolidated Wharf Company' all the property, rights and claims of every kind and description (except certain property specified) of the Galveston Wharf Company; as it did all the right, title, interest and claim of every kind and description of the City of Galveston in and to all land and ground embracing the flats, between and inclusive of Ninth and Thirty-first Streets, and also all rights, capacities, powers and claims of the city to erect wharves and receive wharfage at the ends of streets then extending, or to be extended, to the channel; and it declared those things and rights 'to be henceforth the corporate property, right and title of the said Galveston Wharf Company, and owned, held, possessed, controlled, used and administered by said company.'

"The purpose of this part of the decree was, evidently, to vest in the consolidated company, which, in all instances but one, is called 'The Galveston Wharf Company,' the rights, even of property, as well as of use, which had formerly been owned or claimed by the Wharf Company and the City, or either of them, except as limited on the face of the decree.

"The language used seems, in many respects, sufficient to vest the absolute title in all property and rights to which it applies in the consolidated company; but when considered in conection with the language which immediately follows, it is not inconsistent with an intention to give to the stockholders of the Wharf Company existing before consolidation, title to two-thirds of the property, and to the City one-third; all to be under such qualified ownership and dominion of the consolidated company as was necessary to enable it to carry out the purposes for which the consolidation of the respective interests was made.

"The beneficial interests to accrue from profits, as well

as the proprietary interests which would inure to the respective parties in interest in case of dissolution of the Galveston Wharf Company, are evidenced by the shares of stock of which the parties were respectively declared the owners and holders.

"It is not clear from this part of the decree whether the declaration in reference to the holding of 'one-third by the said plaintiff (the city) in trust as aforesaid' refers to the shares of stock or to the property as well, but the preceding part of the decree, to which reference is made, which relates to the property as well as the shares of stock, renders it highly probable that it was in this connection used in relation to the property as well as the shares of stock; it is, however, immaterial in reference to the matter under consideration, whether it refers to one or both, for in either event the beneficial interest to arise from the use of the property would inure to the benefit of the 'present and future inhabitants of the City of Galveston.'

"Prior to this decree, it will be remembered that there was a contest about the ownership of the property, as well as the right to use all or parts of it, and the latter part of the decree was evidently intended to settle that question by vesting, it may be, the absolute as well as the qualified rights held by the respective parties in or to the property in the consolidated company, as a starting point for the clear investitude of unquestioned title in each to shares in the property, as well as the profits to be derived from its use, to which, by the agreement made the basis of the decree, each party would be entitled.

"The former part of the decree evidences that it was thought such a course was necessary before the rights of the parties, as they desired them to exist in the future, could by the decree be determined.

"The more natural order would have been to vest the property in the consolidated company in the first part of the decree, and in the subsequent part to have vested in the respective parties the property or rights which it was agreed they should severally own, if separate ownership was desired or thought necessary.

"However this may be, the order in which things were done, by the decree, cannot control its construction; for the true inquiry is, What does the entire decree show was the declaration of law, made on the agreement of the parties as to the rights of the respective parties?

"The first part of the decree, after directing the issue of additional shares of stock and determining the number of shares which each of the parties should have, declares that 'the equal undivided one-third of the property of said company (the consolidated company) to be consolidated and vested in it by this decree shall be owned by said city, and represented by the said stock and the rights and interests therein, and in said property of said mayor, aldermen and inhabitants of the City of Galveston, shall be in trust for the present and future inhabitants of the City of Galveston, and all and every part thereof shall be inalienable, and not subject to conveyance, assignment, transfer, pledge, mortgage or any liability for debt whatever, in any other manner than by the vote of four-fifths of all the qualified voters of said city in favor of some clear and specific proposition therefor.'

"This part of the decree declares what shall be the rights of the parties then before the court, after the rights and property of both were consolidated and vested by the decree in the consolidated company.

"It would seem that the declaration as to how the ownership should stand after the property and rights of both parties should by the decree be vested in the one in whose name the business was to be transacted in the future, should control that part of the decree by which the contemplated consolidation was made.

"Taken all together, the apparent intent of the decree is to vest in the City of Galveston not only a right to receive one-third of the dividends, but also the further right to one-third of the entire property of the company, as consolidated; it being, however, subject to the control of the Galveston Wharf Company for the uses and purposes for which the consolidation was made.

"This view is much strengthened by the fact that a power

is recognized, and a method is provided, in the decree, by which not only the rights and interests of the city in the stock which it holds, but also in the property, i. e., an undivided one-third of the whole property consolidated and vested in the Galveston Wharf Company, by the decree, may be alienated by the city.

"Such a power of alienation is inconsistent with any other relationship to the property than that of ownership, it not appearing that a naked power was intended to be conferred.

"The **trust** spoken of in the decree is evidently one imposed not only on the Galveston Wharf Company, but also on the municipal government of the City of Galveston for the benefit of the inhabitants of the city.

"We are of the opinion that the decree vests in the City of Galveston title to an undivided one-third of the property consolidated by the decree, and that it clothes the Wharf Company with a power to be exercised in its management through the directory to be selected in which the city is to be represented as provided by the decree."

Point 1.

The allegations in plaintiff's bill of Complaint that plaintiff owns and holds the title to all the property described in said Bill, vested in it by said decree of April 1st, 1869, and the other facts therein alleged, including said agreement of March 9th, 1905, and so owns and holds one-third thereof in trust for the benefit of the present and future inhabitants of the City of Galveston, to pay over the dividends in proportion to the shares of stock representing the same to said City to be by it used for the benefit of such present and future inhabitants of Galveston, which trust, according to the express terms thereof, cannot be terminated or discharged except by a sale of said one-third interest or the stock representing the same upon a vote of four-fifths of the qualified voters of said City in favor of some clear and specific proposition therefor, and that subject to such trust plaintiff has the absolute ownership, control and dominion over all of said property, and that the City of Galveston agreed in said decree

of April 1st, 1869, and said contract of March 9th, 1905, which agreements were approved and ratified by the Legislature of the State of Texas, that plaintiff, subject to such trust, should own, hold, use, manage and enjoy said property, and that the attempted partition thereof under said charter amendment, Section 118, and attempting to sell one-third of said property, or any part thereof under said amendment, or any of said amendments, upon a majority vote only of the voters of said City, would impair the obligations of said contracts of April 1st, 1869, and March 9th, 1905, and deprive plaintiff of its property and property rights, of the right to control and manage said property, deprive it of its trust, without due process of law contrary to the Constitution of the United States, and same would deprive the present and future inhabitants of said City of their property, property rights, cestuis que trust, of one-third of said property, and the stock representing the same, for that under said contract the interest of said inhabitants can be disposed of only upon a vote of four-fifths of the qualified voters of the City of Galveston in favor of some clear and specific proposition therefor; and that the City of Galveston, having attempted to violate its duty in the premises to such inhabitants, plaintiff as their trustee, is entitled to represent and protect their interest in said property **raise Federal questions under the contract and due process of law clauses of the Constitution of the United States, and invoke the aid of the Federal Courts in the exercise of their equity jurisdiction, to prevent the defendants from impairing and destroying the obligations of said contracts in violation of Section 10 of Article I of the Constitution of the United States, and depriving it and its cestuis que trust of their property and property rights and trust in violation of Article V (amendment) of said Constitution.**

Ordinarily, we think it might probably be assumed that the proposition stated in Point 1 is so self-evident as not to admit of debate. But because of the defendant's contentions with which we were met in the court below that said contracts and confirmatory acts are void and the bare holding of that court that appellant's pleading raised no Federal question, and assuming that similar contentions will be made

here, we address ourselves now to some observations in support of the validity of those contracts.

It was contended by the defendants in the court below:

(a) That the agreement or contract of 1905 is void under Sec. 52, Art. III, and Sec. 3, Art. XI, of the Constitution of Texas of 1876, for that thereunder the City of Galveston could not take stock in the Wharf Company, or lend its credit or grant its public moneys or property of value or make any appropriation or donation to the Wharf Company.

(b) Because it was an attempt to create in plaintiff uncontrollable grants of special privileges and immunities without the control of the Legislature, contrary to Sec. 17, Art. I of said Constitution;

(c) That both the contract of 1905 and the decree or contract of 1869, in so far as they prohibit alienation of the property, except upon a four-fifths vote of the qualified voters of the city, and vest the control of it in plaintiff, are void because contrary to the policy which prohibits perpetuities, and deprive the City of the management of the fee simple interest, and constitute uncontrollable grants or special privileges contrary to Section 17, Art. I of said Constitution;

(d) That there was no election authorizing the compromise decree or contract of 1869 under Ordinance 10 appended to the Constitution of Texas of 1866;

(e) That the decree or contract of 1869 and the contract of 1905 are void because the Legislature could not take away from the City or from future Legislatures the right to determine when and upon what conditions the City's interests in plaintiff's property could be disposed of.

Bearing in mind that the City of Galveston had at the utmost less than one-fifth of the properties consolidated by the Compromise Decree of 1869, ratified by the Legislature in 1870, and that its less than one-fifth consisted of parts of streets, it is appropriate, before considering said contentions in detail, that we quote from Blessing vs. City of Galveston, 42 Texas, 657:

"No principle of law is more clearly or firmly settled than

that public or municipal corporations, established for public purposes, such as the administration of local or civic government, are not in the nature of contracts between the State and the corporation, and that their charters may be annulled and revoked at the will and pleasure of the Legislature, as it deems the public good may require. It is,' said Justice Nelson, 'an unsound and even absurd proposition that political power conferred by the Legislature can become a vested right as against the government in any individual or body of men.' (People vs. Morris, 13 Wend. 325). 'Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the State; but, being wholly political, exist only during the will of the general Legislature; otherwise there would be numberless petty governments existing with the State, forming part of it but independent of the control of the sovereign power.' (16 How. 369.) Such corporations are the creatures of the State, made for a specific purpose, to exercise, within a prescribed limit, powers conferred upon them.

The State may withdraw these local powers of government at pleasure, and may, through its Legislature, or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. (United States vs. The Baltimore and Ohio Railroad Co., Wall.) The Legislature cannot alienate any part of its legislative power. 'It cannot, therefore' says Sharswood, J., 'by legislative act or contract invest a municipal corporation with irrevocable franchise of government over a part of its territory.' (64 Penn. St., 169.)

It necessarily follows from these fundamental and well established general principles, that the fact of an existing act of incorporation, or the failure to submit to the people for acceptance or rejection the new act of incorporation, in no way affects the validity of the new charter. If so, the right and power of government over so much of the State as is included in the corporate limits of the city, is vested, not in the Legislature, but in the local community; and delegated power will have become superior to the source from which it derives its

existence, or the people of a particular locality may dictate the manner in which the legislative power in their particular locality shall be exercised. If, however, assent to the act of incorporation must be shown, this is sufficiently done by the subsequent organization and continued exercise of the functions conferred by the act.

The rule, however, which applies to private corporations, that the incorporating act must be assented to or accepted before it has any effect, has no application to statutes creating municipal corporations. These, as says Judge Dillon, are imperative and binding without any consent, unless the act is expressly made conditional. (Dill. Municipal Corp., Vol. 1, Fifth Ed., Sections 23, 69.)

In Brown vs. City of Galveston, 97 Texas, 1, the court approved Blessing vs. Galveston, and stated in effect that the doctrine of vested rights and powers had no application, that the Legislature could abolish the City government, consisting of the Mayor, Aldermen, etc., and substitute a Commission government, with three or five Commissioners appointed by the Governor, and this notwithstanding Article VI, Section 3 of the Constitution, giving the right of qualified voters to vote for Mayor and other elective officers. On page 15 the court said:

'Since a municipal corporation cannot exist except by legislative authority, can have no officer which is not provided by its charter, and can exercise no power which is not granted by the Legislature, it follows that the creation of such corporations and every provision with regard to their organization is the exercise of legislative power which inheres in the whole people, but by the Constitution is delegated to the Legislature; therefore, it is within the power of the Legislature to determine what form of government will be most beneficial to the public and to the people of a particular community'."

That the Legislature has superior control and the right of disposition over the streets was held by the court in Galveston & Western Railway Company vs. City of Galveston, 90 Texas, before cited. The general proposition is that pub-

lic property is held by the City for the benefit of the public, subject to the superior control and disposition of the Legislature, and this applies to public streets, squares, wharves, levees and landings. 28 Cyc. 298-301. The City never had a fee simple title to any property involved. The streets held to have been dedicated by the City Company in Menard vs. City, 23 Texas, 349, were dedicated to the general public, as there was no City then in existence, said City having been created by an Act of the Congress of the Republic of Texas incorporating it, approved January 28, 1839, and the dedication having been made not later than April 17th, 1838. (Menard vs. City of Galveston, 23 Texas, 401-404, Gammel's Laws of Texas, Volume 2, 94). The Act of December 8th, 1851, Gammel's Laws, Volume 3, page 1043, Section 1, conferred the privilege on the City of opening the streets running to the channel, and the right to erect wharves at the end of such streets. Section 2 conferred the power of fixing rates of wharfage and collecting the same. Section 3 conferred the power to fill such portions of the flat between ordinary low tide and the channel, as City may deem necessary for public purposes. Section 4 thereof relinquishes and releases to the City all the rights and privileges above mentioned. It is plain that the City never had fee simple title to any of the property. It was merely given the right to use the property for public purposes, so that the rights in the streets and the wharf privileges at the end thereof were strictly public property within the rule that the Legislature possesses the absolute authority to dispose thereof. The four sections of the Act of the Legislature of Texas of December 8th, 1851, referred to, and which constitute the entire Act, except the caption, are as follows:

"Section 1. Be it enacted by the Legislatue of the State of Texas, That the corporation of the City of Galveston shall have the power and privilege of opening all the streets running North and South on the Bay side of said city to the channel; and shall also have the power and right to erect wharves at the end of such streets as they may deem proper.

Sec. 2. That the said corporation shall have power to fix the rates of wharfage and to collect the same, on all goods,

wares and merchandise, landed upon said wharf or wharves; to bring suit to recover the same before any Court having jurisdiction of the amount in controversy.

Sec. 3. That the said corporation shall have the power to fill such portions of the flats covered by water, between ordinary low tide water mark, and the channel on the Bay side, as said corporation may deem necessary for public purposes.

Sec. 4. That the State of Texas hereby relinquishes and releases unto the corporation of the city of Galveston, all the rights and privileges above mentioned; provided, that nothing in the third and fourth sections of this act shall be construed to affect any legal title to wharf privileges held by persons in said City; and that this act take effect and be in force from and after its passage."

These very questions appear to have been determined at the City's instance, contrary to the very claims that it now makes, in Hitchcock vs. Galveston Wharf Company, 50 Federal, 263, by the Circuit Court, presided over by Circuit Judge Woods, afterwards a Justice of the Supreme Court. Hitchcock having a judgment against the city, undertook by garnishment proceedings to subject the stock held by the City in the Wharf Company, or the dividends arising therefrom, to the payment of his judgment. The Circuit Court decided that this could not be done, for the reason that neither the stock nor the dividends were the property of the City, but were held by the City in trust. The Court said:

"Now, it is clearly settled that whatever property the City had in the water front it held for the benefit of the public, and that it was not liable for the City's debts. Klein vs. New Orleans, 99 U. S. 149. And such property could not be alienated by the City, any more than its streets and squares, save by consent of the Legislature. Hart vs. Burnett, 15 Cal. 530. When the City, therefore, undertook, by the adjustment and compromise between it and other claimants, which was embraced in a consent decree referred to in the answer, to transfer to a private corporation its title to the water front of the city, it undertook to do what required the legislative

sanction to give it validity. In our judgment, the adjustment and compromise derives all its vitality from the ratifying act of the legislature, and the case stands precisely as if, before the making of the adjustment and compromise, the legislature had authorized it to be made upon the terms and conditions embraced therein. It was competent for the legislature, in authorizing the sale of the title of the city to the water front, to prescribe the conditions of the sale, and to direct what disposition should be made by the city of the consideration received for the property sold. This the legislature, by the confirmatory act, has undertaken to do. It has said that the city shall hold the proceeds of the property 'in trust for the present and future inhabitants of the the City of Galveston, and all and every part thereof shall be inalienable, and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever, in any other manner than by the vote of four-fifths of all the qualified voters in favor of some clear and specific proposition therefor.' These very limitations appear written on the face of the stock certificate issued by the Wharf Company to the City. The City, by the authority which permitted a sale of the water front, which was itself trust property, inalienable except by legislative consent, and not liable to be taken in execution, is made a trustee of the proceeds of the sale, not for the benefit of the municipal corporation known as the 'City of Galveston', but of the present and future inhabitants of the City. Those proceeds are decreed by the legislature inalienable, except upon the vote of four-fifths of the qualified citizens, and not to be at all liable for the debts of the City of Galveston. * * * * *

To sum up my views on the merits of the case: The title of the City of Galveston to the water front was held by the city as a trustee for the public. Hart vs. Burnett, 15 Cal. 531. That title was inalienable, save by consent of the legislature, and the property was not liable to execution and sale for the debts of the City. By the compromise between the City and the Wharf Company, and the confirmatory act of the legislature, a sale of this property so held by the City for public use to a private corporation was authorized and confirmed.

The legislature, by the same act, directed that the proceeds of the sale should be held by the city on the same trust, substantially, as the property sold, namely, for the use of the present and future inhabitants of the City of Galveston, and should not be liable for its debts. In my judgment, the City holds as a trustee, and for that reason the trust properly cannot be sold for its debts."

Another contention now made by the City was then made by Hitchcock, and was expressly overruled by the court:

"On the other hand, it is claimed that this stock is held by the City just as it holds any other municipal property, and not otherwise; that the trust is not for any specific purpose; that it is held for profit; and that it is not necessary to carry on the city government; and therefore, it is liable for the city's debts."

In another case of Hitchcock vs. City of Galveston, 48 Federal, 640, Mr. Justice Bradley of the Supreme Court, sitting in the Circuit Court, refused to mandamus the City to levy a tax pending disposition of the garnishment case, Hitchcock having removed that case to the Supreme Court of the United States by writ of error. We insert the following from the opinion of Mr. Justice Bradley:

"The plaintiffs argue that the city is estopped from urging this objection to the mandamus, because it contends and insists that the property garnished is not liable to be applied to the payment of the judgment. But this argument cannot avail the plaintiffs, for they are equally estopped by contending and insisting that it is so applicable." * * * * *

"Had the plaintiffs yielded to the judgment of this court in reference to the stock of the Wharf Company, they might then, perhaps, have been in a position to ask for this kind of relief. But not thus yielding, they take the attitude of still pursuing the stock as a just means of satisfying their judgment."

It is true that Judge Woods treated the transaction as a sale to the Wharf Company, while the Compromise Decree is quoted exclusively in the statement of the case at page 265.

It was not necessary for a disposition of the case for Judge Woods to determine whether the inhabitants had the interest in the property itself as well in the stock, which was afterwards determined by the court in Wharf Company vs. City, 63 Texas.

For convenience we here set out Ordinance No. 10 of the Ordinances passed by the Convention of 1866, which have been held by the Supreme Court of Texas to be a part of the Constitution of that year, Section 52 of Article III, and Section 3 of Article XI of the Constitution of 1876 which, with various amendments since adopted, is now the Constitution of the State of Texas.

Ordinance No. 10, which was passed by the Convention March 29, 1866, and with other Ordinances of the Convention and the Constitution of that year, was ratified June 25, 1866, was as follows:

"Any county, city, or town of this State, may become a stockholder in, or loan its credit to, any company, association, or corporation: **Provided,** two-thirds of the qualified electors of such county, city or town, voting at an election held therein, under rules and regulations prescribed by law, assent to the same."

Said Ordinance, with the Constitution of 1866, was superseded and ceased to be in force on July 5, 1869, on which date the Constitution of Texas of that year was ratified, and attention is here specially called to the fact that the Constitution of 1869 contained no provision similar to Ordinance 10, and no similar provision was engrafted upon the organic law of the State until the adoption of the Constitution of 1876, which contains Section 52 of Article III, reading as follows:

"The Legislature shall have no power to authorize any county, city, town, or other political corporation, or subdivision of the State, to lend its credit or to grant public money or thing of value, in aid of or to any individual, association, or corporation whatsoever; or to become a stockholder in such corporation, association or company," and Section 3 of Article XI, which is as follows:

"No county, city or other municipal corporation shall

hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law."

Referring particularly now to defendants' contentions (a) and (b) (ante p. 54), we respectfully submit:

That the restrictive provisions in the Constitution of 1876 have no aplication to this case, for the reason that all of the stock held by the City in trust was so acquired by it in 1869 and 1870 under the Compromise Decree and the Legislative Act of Ratification. The City contended, in virtue of the same, and the other transactions which occurred in 1869, also ratified by such act, that the City had acquired its one-third interest as trustee in the property West of Thirty-first Street, and this claim of the City was admitted by the Wharf Company in the Agreement of 1905, by which the Wharf Company did not undertake to confer any title on the City by quit-claim or otherwise, but merely conceded the City's claim of title, so that in this respect the Agreement had no other effect than if there had been a decree of court after a trial adjudging that the City, by the transactions which occurred in 1869 and 1870, acquired an undivided one-third interest as trustee in the property West of Thirty-first Street. It may not be amiss to again quote the concluding language in Section 3, Article XI, of the Constitution of 1876: "This shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law." It may be likewise appropriate to refer to Section 7, Article XII of said Constitution, (the article referring to private corporations) which states that: "Nothing in this article shall be construed to divest or affect rights guaranteed by any existing grant or statute, of this State, or of the Republic of Texas," and to Section 18, Article XVI, which states that: "The rights of property and of action, which have been acquired under the Constitution and laws of the Republic and State, shall not be divested."

(c) (Ante page 54). Even if the Constitution of 1876 had been in force in 1869 and 1870 no special privileges or immunities were conferred on plaintiff within the meaning of Section 17, Article I. Plaintiff has the same privileges and immunities, if any, as are enjoyed by all other persons or corporations doing a similar business, and they are in no sense special. The only purpose of that provision of the Constitution insofar as plaintiff is concerned is to maintain the State's control over properties charged with public use, or in which the public have an interest, which control exists with reference to plaintiff and was first exercised by the legislature in 1892, when plaintiff as a railroad, was subjected to the jurisdiction of the Texas Railroad Commission, and again exercised by the Act of 1911, when plaintiff, as a wharf and dock company, was subjected to the jurisdiction or control of the Railroad Commission, by which act plaintiff as a terminal railroad was again subjected to the jurisdiction thereof.

(d) (Ante page 54). Ordinance number 10 of the Constitution of 1866 was a grant of authority to the Cities, and in no sense a limitation on the authority of the legislature.

In Harcourt vs. Good, 39 Texas, 456, the Legislature had passed an act after the Constitution of 1866 was in force providing that such elections, as provided for by Ordinance 10, should be deemed carried if two-thirds of the electors voting thereat should vote in favor of the proposition. (Gammel, Vol. 5, page 1137). It was argued that an election held by the Town of Columbus which subscribed to stock of the B. B. B. & C. Railroad Company was void, because of the difference between the Legislative Act providing that two-thirds of the electors voting at an election should have the right to carry a proposition, and the provisions of the Ordinance that two-thirds of all the qualified electors must vote in favor of it. The court held that under the general rule the Legislature had all powers not expressly denied it by the Constitution, and had authority to authorize the subscription by cities, etc., on other terms than those provided by the

Ordinance, and that the terms of the Ordinance should not be deemed exclusive.

If the reasoning of Harcourt vs. Good requires enforcement of a later date, we refer to the very strong opinion of Justice Brown in Brown vs. City of Galveston, 97 Texas, which holds to the doctrine that the legislature possesses all power not expressly denied to it by some provision in the Constitution, or by necessary implication therefrom. Moreover, it has been shown that such property interests as the city held prior to the Compromise Decree of 1869 was public property, and as such was subject to the disposition of the Legislature, which could dispose of the same without the consent of the City, and therefore, had power to turn the property over to the Galveston Wharf Company and to give the beneficial interest therein to the inhabitants of the City. So, even if Ordinance 10 was a restriction on the power of the Legislature, it did not preclude the Legislature from disposing of property which it had the right to dispose of, and merely requiring the City to hold stock in trust. The stock, not being the property of the City proper, but of the inhabitants, it is not in any case within the words of Ordinance 10. After the lapse of fifty years, the presumption in favor of judicial, legislative and executive regularity, should be that if an election were required it was held and the record thereof has been lost. The Act of 1870, which according to the view of Judge Wood, gave vitality to the Compromise Agreement or Decree, was not passed under the Constitution of 1866, but under that of 1869, when Ordinance 10 was no longer in effect, and there was no restriction whatever on the power of the Legislature to authorize municipal corporations to own stock. Certainly, an act passed in 1870 authorized by the then Constitution, cannot be held unconstitutional because it might have been so under a preceding Constitution which was no longer in existence.

It is further submitted that Ordinance 10 has no application for the reason that the Legislature had the superior authority and control over the streets and the wharf privileges at the end thereof, the city only holding the same in trust (Waterbury vs. Laredo, 68 Texas, 565; Weeks vs. City

of Galveston, 21 C. C. A. 102), so that regardless of Ordinance 10 the Legislature, by ratifying the Compromise Decree of 1869, authorized the issuance of the stock to the city as a trustee only for the inhabitants. It is the settled rule that municipal corporations may act as trustees. Dillon on Municipal Corporations, 5th Ed., Vol 2, Section 982.

It is further submitted that Ordinance 10 has no application because the City never subscribed for any stock of the Wharf Company, never contributed anything of value to the Wharf Company, and never in any manner, shape or form loaned its credit to the Wharf Company.

Upon a fair construction of Ordinance 10 it means that upon the two-thirds vote required, the City may take stock in a corporation in consideration of money to be raised by taxation or otherwise. The present transaction could have been consummated without the issuance of any stock whatever to the city, by a simple provision in the decree; for example, whenever the Wharf Company paid $3.00 dividends to its stockholders it should pay $1.00 to the City for the use of the inhabitants. The stock of the City is not real stock, for it has no voting power, and is simply held by the City as a representative of the interests of its inhabitants in the property, and as a means of determining the extent to which they are entitled to participate in the earnings of the plaintiff. In other words, the stock might have been called a promissory note, or a bond, or given any other name that the parties might fancy, and the result would have been the same.

So many views can be taken of Ordinance 10 which will not impeach the validity of the Compromise Decree, that the court will not look for an application thereof which would upset a transaction, the validity of which the parties have affirmed and acted under for fifty years, with legislative approval. G. H. & S. A. Railway Company vs. State, 77 Texas, 367, 388.

Between July 5th, 1869, when the Constitution of 1866 and Ordinance 10 ceased to exist, and June 23rd, 1870, the date of the Act confirming the Decree of 1869, the City drew and still retains dividends on its stock, and the Directors of the

City in the Wharf Company directorate, including the Mayor, attended on different dates during such period, July 5, 1869, to June 23rd, 1870, six directors' meetings of the Wharf Company, (R. 6, 51), and thus the city, after Ordinance 10 ceased to be effective, continued the Compromise Agreement in effect or renewed the same by accepting dividends on the stock and participating in the management of the Wharf Company, so that the City and the Wharf Company, even if the contract was invalid for want of power, by re-affirming the same after the disability had ceased, having by implication renewed the contract after such disability had ceased, the same was an existing contract which could be ratified by the Legislature at the time of the confirmatory Act. Aside from this there is no reason why the Legislature may not validate the action of the municipal corporation or mere department of the State Government, although there may have been no authority therefor prior to the validating act. In other words, regardless of what had gone before, the confirmatory Act of 1870 read into the charter of the City of Galveston, the Compromise Decree of 1869.

The validity of the Compromise Decree of 1869 was not only affirmed in Hitchcock vs. the Wharf Company, but also in Galveston Wharf Company vs. Galveston, 63 Texas, 17, in which, referring to said decree the Supreme Court said:

> "The decree thus rendered was confirmed by an act of the legislature of June 23, 1870. There therefore arises no question as to the binding force and effect of that decree, which might arise but for the confirmatory act."

It was also contended by the defendants that the Compromise Decree of 1869 and the contract of 1905 and the corresponding confirmatory acts of the Legislature are void on the theory that they are in violation of the provisions of the Texas Constitutions of 1866 and 1876 prohibiting perpetuities. Those constitutions did prohibit perpetuities but did not define them. In view of the strong presumption of the constitutionality of legislative acts to declare an act void because creating a per-

petuity, the court would not be justified in acting on any loose idea of perpetuities, but would require a specific showing that the thing was a perpetuity within some well settled and undebatable rule of common law. Common law rule against perpetuities merely prohibits a creation of a future contingent interest, unless by the terms thereof the interest must vest within a life or lives in being and 21 years thereafter, and refers only to the time of the vesting of an estate and not to the duration of an estate already vested. First Tiffany on Real Property, Section 152, 30 Cyc. of Law, pages 1468, et seq. We quote from page 1476:

"Equitable interests are vested whenever the corresponding legal interests would be vested, and vested equitable interests are no more subject to the Rule against Perpetuities than vested legal interests."

An act of the Legislature will not be declared unconstitutional on account of any ideas of policy or analogies of perpetuities, for the simple reason that the Legislature, and not the courts, has the right to express the policy of the State. The policy with respect to this particular property was declared by the Confirmatory Act of 1870 and the similar Act of 1905, which seems to have been a wise policy because by uniting the fragments of wharf frontages (80 feet) owned by the City, with the intervening 300 feet spaces privately owned, a property has been built up which has served a great public purpose, which could not possibly have been accomplished had the fragments of channel frontages remained separate. We submit that the doctrine of perpetuities has not and never had application to property held by a corporation charged with a great public use, it being contemplated by the Constitution and laws that such properties would be indefinitely owned, alienation whereof is permissible only with express legislative authority. No case has come to our attention in which it has been held that the rule of perpetuities has any application to public property or quasi public property devoted to a public use.

The statutes of the state concerning the corporate hold-

ing of real estate permit corporations to hold indefinitely all real estate required for the purpose of their business. Revised Statutes, Articles 1175-1181. In any case, the interest of the city or its inhabitants has long since vested, subject to present sale, and the mere fact that such sale is not permissible without the consent of all of the owners or of a certain majority thereof does not constitute a perpetuity. There is no question but that the Legislature could have authorized an agreement vesting all of the property outright in the Wharf Company, giving the City stock to represent its interest, without creating a perpetuity. If the Legislature could do that why could it not do what it did, approve the agreement vesting absolute title in the entire property in the Wharf Company for the purpose of management and control, with a right to one-third of the property so qualified in the inhabitants of the City of Galveston, subject to sale at any time upon a vote of three-fourths of the qualified voters of the City. It might have been agreed that the same could be sold upon a majority vote or a two-thirds vote or a three-fifths vote, and in principle there would be no more ground for claiming perpetuity in one case than in the other.

ESTOPPEL.

Not admitting any vice in the Compromise Decree or Contract of 1869 or the contract of 1905, or the Legislative acts confirmatory thereof, on the grounds of unconstitutionality or invalidity for any reason, but on the contrary denying the existence of any such vice, and insisting that said decree and contracts and said confirmatory acts are in every respect constitutional, vital, valid and enforceable, it is submitted that the defendants are estopped to deny the constitutionality, vitality, validity and enforceability of said decree and contracts, and are estopped to deny that an election was held such as mentioned in Ordinance 10 of the Constitution of 1866 at which the entering into and making of the Consent or Compromise Decree of 1869 was authorized or ratified by a vote of two-thirds of the qualified voters of the City of Galveston.

That the rule of estoppel applies to Municipal Corporations has been often decided, and that a Municipal Corporation may be estopped from asserting that an election such as mentioned in Ordinance 10 was not held, we do not think can be seriously questioned.

Commissioners of Knox County vs. Aspinwall, et al., 21 How. 539.

Moran vs. Commissioners of Miami County, 2 Black, 722.

McGuire vs. Rapid City (Dakota), 5 L. R. A. 752.

Colfax vs. Maxton, et al., (Ill.), 16 L. R. A. 178.

(See also Peoria vs. Central National Bank (Ill.), 12 L. R. A. (N. S.) 687.

Portland vs. Inman Poulsen Lumber Co. (Oregon), 46 L. R. A. (N. S.), 1211, (re estoppel of municipal corporation to open or claim title to streets).

Pendleton County vs. Amy, 13 Wall., 304.

In the foregoing and other cases contracts supported by estoppel have been treated just the same as other contracts. Defendants advanced in the Court below the novel contention that if a contract depends for proof of its existence upon estoppel, it is not a contract within the meaning of the contract clause of the Federal Constitution. But we submit that where a party is estopped from denying that he assented, or that he had the capacity or power to assent, it is the legal equivalent of an express mutual consent by parties having the capacity and power to consent. The parties are conclusively presumed by law to have agreed. This contention of the defendants would read into the contract clause of the Federal Constitution an exception that "This clause does not apply where the contract depends on estoppel or presumed assent of one of the parties." The function of the Court where an issue of this kind is involved is stated with unusual force and terseness by Mr. Justice White in St. Paul Gas Light Company vs. St. Paul (181 U. S. 147), in this language:

"Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the

power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the State Court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose. Houston & Texas Central Rd. vs. Texas, 177 U. S., 66, 77, and cases cited. In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what obligations arose from it? And, Has there been state legislation impairing the contract obligations?

"It is no longer open to question that a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States. New Orleans Waterworks Co. vs. Louisiana Sugar Refining Co., 125 U. S., 18, 31; Hamilton Gas Light Co. vs. Hamilton City, 146 U. S., 258; Walla Walla vs. Walla Walla Waterworks Co., 172 U. S., 1."

So in this case, under the allegations of plaintiff's bill it was in the power and became the duty of the Court to determine (a) whether the contracts plead by plaintiff existed by estoppel or otherwise, and (b) whether the amendments to the City Charter adopted at the election of May 4, 1920, attacked by the plaintiff in this suit, and the enforcement thereof, would constitute an impairment of the obligations of said contracts, or would deprive appellants of their property and property rights without due process of law.

In the case of Pendleton County vs. Amy, the Supreme Court of the United States said:

"The third plea was in effect a denial of any legislative authority to the county to subscribe to the stock of the railroad company, and to issue bonds for the payment of such

subscription. The general demurrer to it raises the question whether it presented a substantial defence to the action.

"It is to be noticed at the outset that the plea concedes legislative authority to the county to make a subscription, and to issue bonds in payment, though the exercise of the authority was required to be preceded by a popular vote. It concedes that the bonds were in fact made and issued. We say it concedes this, because such making and issue are alleged in the declaration, and the plea does not traverse the allegation. It concedes that the subscription was made; that the bonds were delivered to the company in payment; that they were sold for $50,000; that the plaintiff subsequently became the owner, and hence that he stands in the position of a purchaser for value; and it concedes that the county obtained for bonds a certificate of stock in the railroad company, which it now holds.

"Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchaser of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers. or the people of the county, the bonds can **always** be avoided in the hands of an innocent purchaser by proof that the county officers, or the people, have not done, or have insufficiently done, the things which the legislature required to be done before the authority to subscribe, or to issue bonds, should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the conditions which the law attached to the exercise

of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect bona fide purchasers against an attempt to set up noncompliance with the conditions attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained.

"But for the reasons given above the case must be sent back for another trial; when doubtless, the pleadings will be changed." Pendleton County vs. Amy, 13 Wallace, 304-306. See also the following cases cited in the opinion:

Commissioners of Knox County vs. Aspinwall, et al., 21 Howard, 539; Bissell vs. City of Jeffersonville, 24 Id. 287; Moran vs. Commissioners, 2 Black. 722; Meyer vs. Muscatine, 1 Wallace, 384; Van Hostrup vs. Madison City, 1 Id. 291; Supervisors vs. Schenck, 5 Id. 772.

Construing the opinion in Pendleton County vs. Amy, the Supreme Court of the United States in Quinlan vs. Green County said:

"In this case there was no recital in the bond. It appeared by the pleadings that the bond had been exchanged for stock of the Railway Company which was retained, and the decision was based upon the ground that the retention of the stock created an estoppel." Quinlan vs. Green County, 205 U. S., 419, 421.

The City of Galveston, and the other defendants, are estopped for that:

(a) Said City accepted the certificate for 6,222 shares of the capital stock of the Wharf Company issued to it in accordance with the provisions of the Compromise Decree of April 1st, 1896, and has never demanded the issuance to it of any more stock, and has retained the same and collected and retained, and still retains, the dividends declared thereon by the Board of Directors, including the directors representing the City, for fifty years. (R. 6-7, 50-51). During that part of said time between July 5th, 1869, on which day the constitution of 1866 and Ordinance 10 ceased to exist by the ratification of the Constitution of 1869, and June 23, 1870, the date of the approval of the Act of the Legislature ratifying and confirming said Compromise Decree, said City collected seven separate dividends on said stock. (R. 51.)

(b) Said City by and through its three directors, one of them being the Mayor and the other two being chosen for two years by each succeeding City Administration, actively participated in the management of the Wharf Company for fifty years (R. 6, 50-51), and during that part of said time between said April 1st, 1869, and June 23, 1870, said directors so participated in seven meetings of the Board of Directors of said Wharf Company, once on May 8th, 1869, at which meeting the Mayor of said City voted said 6,222 shares of stock in favor of a resolution, which was adopted and carried out, for the purchase of additional property by the Wharf Company and the payment therefor by the issuance to the vendor of an additional issue of 5,500 shares of capital stock of said

Wharf Company, and for the purchase of other property (R. 6-7), and the other six meetings being those held December 15th and 23d, 1869, and January 8th, March 16th, April 14th, and May 21st, 1870. (R. 51.)

(c) Said City has assessed and collected taxes on the property since 1884 in accordance with the decision of the Supreme Court of Texas construing the Compromise Decree of 1869, in the case of Galveston Wharf Company vs. City of Galveston, 63 Texas, 14, which was decided in December of that year. (R. 7, 51.)

(d) In 1886 said City by resolution of the City Council ordered the property to be assessed in accordance with said Compromise Decree of 1869, as the same and the opinion of the Supreme Court of Texas in Galveston Wharf Company vs. City of Galveston, 63 Texas, 14, were construed by its then City Attorney. (R. 7-8.)

(e) Said City entered into and executed the agreement or contract of 1905, in which the validity of the Compromise Decree of 1869 was expressly recognized, admitted and reaffirmed, and said City requested the Legislature of Texas to confirm, ratify and approve said contract as a part of its charter, and said Legislature did so approve, ratify and confirm said contract by an Act which took effect April 15th, 1905, and said City has received and retained and still retains all the benefits accruing to it under said contract and confirmatory decree. (R. 8-9, 51-52.)

(f) That in accordance with the provisions of said contract of 1905, ratified, confirmed and approved by the Act of the Legislature of the State of Texas, which took effect April 15, 1905, the Wharf Company has waived and abandoned its claim for $57,000 over-payment of taxes and dismissed its suit seeking to recover the same, and has paid to said City of Galveston, and said City collected and received from said Wharf Company, and retained, and still retains, the $60,000.00 for drainage purposes and $2,000.00 fire protection claim provided by said contract to be paid by said Wharf Company to said City, and said Wharf Company has up to this time fully performed said contract and said City has received and

retained, and still retains, all the benefits accruing to it thereunder. (R. 51-52.)

(g) That during said fifty years said Wharf Company, with the consent and active co-operation, participation and concurrence of the City through its directors aforesaid, has authorized and incurred the expenditure of and has expended millions of dollars of money taken from its earnings in purchasing additions to the property, developing, improving and placing permanent improvements thereon, including developments of and improvements placed upon such additions, when if such money so expended had been paid out in dividends to its stockholders, including said City of Galveston, approximately three-fourths thereof would have gone to its individual stockholders and one-fourth to said City, whereas the value of such additions and of the developments and improvements so made accrued one-third to said City and two-thirds to its individual stockholders. (R. 13-14, 50.)

(h) That a very large and expensive part of said developments and improvements has been so made and placed in and upon parts of said property that would be occupied by streets in the City of Galveston were streets open on or through said property, so that if said compromise decree be held invalid and the parties placed in their original positions as the same existed prior to the date of said compromise decree said part of such developments and improvements would stand in and upon the streets. (R. 13-14, 50.)

(i) That during all said time, to-wit: ever since the date of said compromise decree of April 1st, 1869, said City of Galveston, so actively participating in the management of said Galveston Wharf Company, and well knowing that many purchasers were innocently purchasing and would purchase shares of said Wharf Company's stock, in ignorance that said City claimed or would ever claim any right to partition said property or that it questioned or would ever question or repudiate the validity of said compromise decree and confirmatory act of the Legislature, or that it claimed or would ever claim any right whatever superior to the rights of all other holders of said Wharf Company's capital stock, stood silent

and permitted said purchasers to purchase such shares of stock, paying valuable considerations therefor. (R. 51.)

(j) That in the suit of Galveston Wharf Company vs. City of Galveston, filed in the District Court of Galveston County, Texas, on or about July 31st, 1882, to enjoin the collection by the City of Galveston of taxes upon more than two-thirds of plaintiff's property East of Thirty-first Street, upon the ground that under the Compromise Decree of 1869, the other one-third thereof was held by the City in trust for the then present and future inhabitants of said City solely for public purposes, said City defended, asserting and affirming the validity of said compromise decree and confirmatory legislative act and claimed that thereunder the character of its ownership of or interest in one-third of the property as fixed and established by said compromise decree was such that said one-third was not exempt from taxation, the contentions of the Wharf Company in said case, however, being sustained by the Supreme Court of Texas in Galveston Wharf Company vs. City of Galveston, 63 Texas, page 14, on December 19th, 1884. (R. 7, 49.)

(k) That in a certain suit filed in the United States Circuit Court for the Eastern District of Texas at Galveston about June 9th, 1879, by Hitchcock & Company, holders of a judgment against said City of Galveston for $117,550.00, against said Galveston Wharf Company, alleging that said City was a stockholder in said Wharf Company and was receiving dividends upon its stock therein, in which suit a writ of garnishment was sued out against said Wharf Company as garnishee of said City commanding said Wharf Company to answer what number of shares of its capital stock was owned by said City, which writ of garnishment having been duly served upon the garnishee, said City of Galveston, pursuant to resolution adopted by its City Council, directed said Galveston Wharf Company to answer in said cause for said City and for its benefit, that under and by virtue of said compromise decree of 1869 and the confirmatory legislative act, said 6,222 shares of the Wharf Company's capital stock was held by said City in trust merely for the then present and the future inhabitants of said City and that under and by virtue

of said compromise decree said shares of stock and the dividends thereon were not subject to said writ of garnishment, which said defense said Galveston Wharf Company made as so instructed by said City, and it was so found and adjudged by the Court in said cause. (R.49-50.)

(l) That while said suit of Hitchcock & Company vs. Galveston Wharf Company was pending and prior to the final decision thereof, the Wharf Company declined to pay to said City the dividends accruing upon said 6,222 shares of its capital stock, and said City of Galveston affirming, asserting and relying upon the validity of said compromise decree of 1869 and confirmatory legislative act, in pursuance of resolutions adopted by its City Council, filed its suit in the District Court of Galveston County, Texas, on or about August 10th, 1880, against said Galveston Wharf Company and Hitchcock & Company, seeking to recover against said Wharf Company judgment for the amount of said accrued dividends, basing its claim thereto upon its rights under and by virtue of said compromise decree and confirmatory legislative act and asserting the validity thereof. (R. 50.)

It may be said that the City was not a party to the suit of Hitchcock & Company vs. Galveston Wharf Company, but that is immaterial, since the defense in said suit was made by said Wharf Company under the instructions and for the benefit of said City. In Whiteselle vs. Jones (Texas C. C. A.) 39 S. W. 405, Jones sued Whiteselle and Allyn, alleging that Allyn had in his hands certain money derived from an insurance policy, on exempt property of Jones and his wife, and that Whiteselle & Company being creditors of Jones, sued out a writ of garnishment against Allyn, and by collusion with the latter obtained the money due to Jones from the exempt property. Jones was not a party to the garnishment suit, but in the answer in that suit, which Allyn filed, it was explicitly pleaded that the money held by him was not subject to garnishment because derived from insurance on Jones' exempt homestead. It was shown that the defense of the garnishment case was conducted under the personal supervision of Jones, and was in his interest as well as to protect

the garnishee and the attorney who represented the garnishee on the trial testified that he appeared as attorney for Jones. In this state of case it was held that the judgment against the garnishee was conclusive against the exemption claim of Jones and his wife and that although they were not cited in the garnishment case, Jones appeared in Court and made all the defense he could have presented had he been properly cited, and that he was bound by the judgment.

One who prosecutes or defends a suit in the name of another to establish his own right or who assists in the prosecution or defense of a suit in aid of some interest of his own and who does this openly to the knowledge of the opposing party is as much bound by the judgment as he would be if he had been a party to the record. (A. & E. Enc. of Law, Vol. ....., page 738, and authorities there cited.)

"Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interest in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on behalf of and for the benefit of such person." 23 Cyc. 1245; McCarty vs. Lehigh Valley Railroad Company, 160 U. S. 110; Green vs. Bogue, 158 U. S. 478; Stout vs. Lye, 103 U. S. 66; Chirac vs. Reinecker, 11 Wheat. 280; American Cotton Company vs Simmons, 87 S. W. (Tex.) 842.

THE TRUST.

Point 2.

Plaintiff's allegations that the threatened or attempted partition of the property, or sale or attempted sale of the one-third thereof held in trust for the inhabitants of the City of Galveston by a mere majority vote, and without a four-fifths vote of the qualified voters of said City, would deprive plaintiff of its trust established by said decree of 1869, and the present and future inhabitants of said City of their property and property rights under said trust without due process of law, and that said City had attempted to violate its duty

in the premises to such inhabitants, and that plaintiff as their trustee, is entitled to represent and protect their interests in said property, raises a *Federal* question and gives the *Federal* Court jurisdiction. (R. 12-13.)

It will be noted that in the fifth paragraph on page 22, 63 Texas, Galveston Wharf Company vs. City of Galveston, Judge Stayton put the word "trust" in italics, and stated clearly and expressly that the trust was imposed not only on the plaintiff but also on the municipal government of Galveston, for the benefit of the inhabitants of the city. We, therefore, have a case of two co-trustees, the plaintiff and the city, holding one-third of the property in trust for the benefit of the present and future inhabitants of the city, which trust, as indicated in the opinion of Judge Stayton, can only be dissolved by the dissolution of plaintiff as a corporation, or by a sale of the interest of such inhabitants when authorized by a four-fifths vote of all of the qualified voters of the city. We have a case in which one co-trustee is attempting to partition the property or to sell the interest of the City's inhabitants therein, in violation of the trust, and of the contract under which the same is held. With a few exceptions, none of which here apply, equity has exclusive jurisdiction of trusts. 2 Story's Equity Jurisprudence, 13 Ed., Chapter 24, page 266.

As illustrative of the extent to which Federal Courts of Equity have exercised jurisdiction in cases of trust or fiduciary relations, we refer to Stock Yards Bank vs. Gillespie, 137 U. S. 411, where suit was upon a money demand only; Darlington vs. Turner, 202 U. S. 195, money demand only; Clews vs. Jamieson, 182 U. S. 461, money demand only.

The relation of principal and agent alone may confer equity jurisdiction. Hayward & Clarke vs. McDonald, 102 Federal, 890.

The owner of an equitable title may resort to equity, although he might defend an action at law on limitation or prescription. Massenburg vs. Denison, C. C. A. 5 Cir., 71 Federal, 610.

In Case vs. Beauregard, 101 U. S. 691, the court said:

"But when the bill asserts a lien, or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

The following cases are also illustrative of the jurisdiction in cases of trusts: Irving vs. Marshall, 20 Howard, 558; Seymour vs. Freer, 8 Wallace, 202; Bay State Gas Company vs. Rogers, 147 Federal, 557; Hayes vs. Pratt, 147 U. S. 557.

"Besides there is an element of trust in the case, which, wherever it exists always confers jurisdiction in equity." Oelrichs vs. Spain, 15 Wallace, 228.

A trustee is entitled to the instruction and aid of a Court of Equity and the Court will prevent a trustee from committing a breach of the trust. 2nd Perry on Trusts, 3rd Ed., Section 928, p. 583; 3rd Pomeroy's Equity Jurisprudence, Sections 1064, 1156, 1058, 1340.

For a discussion of the Equity jurisdiction to restrain municipal corporations from committing breaches of trust, and to administer such trusts to the extent necessary to see that they are observed by municipal corporations, see Dillon on Municipal Corporations, Vol. 4, Fifth Ed., Sections 1574 to 1588 inclusive.

Equity will enforce or administer trusts. Rogers vs. Penobscot Mining Company, 154 Federal, 606, 83 C. C. A. 330; Rumbarger vs. Yoakum, 174 Federal, 55; Memphis Savings Bank vs. Houtchems, 115 Federal, 96.

Equity has jurisdiction of trusts, although there is a remedy at law. U. S. vs. Meyers, 2 Brockenborough, 516, and cases cited.

It is the duty of a trustee to defend the title to the property. Williams vs. Gibbs, 20 Howard, 525.

We quote from 2nd Storey's Equity Jurisprudence, pages 266, 267 and 268:

"The positive law being silent on the subject, Courts of Equity, considering the conscience of the party intrusted as bound to perform the trust, have, to prevent a total failure

of justice, interfered to compel the performance of it. And as they will compel the performance of the trust, so on the other hand they will assist the trustees and protect them in the due performance of the trust whenever they seek the aid and direction of the court as to the establishment, the management, or the execution of it." Sec. 961.

"A trust in the most enlarged sense in which that term is used in English Jurisprudence may be defined to be an equitable right, title, or interest in property real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits or charges, constitute the trusts which Courts of Equity will compel the legal owner as trustee to perform in favor of the cestui que trust or beneficiary." Sec. 964.

Equity will prevent a breach of trust. 3rd Pomeroy's Equity Jurisprudence, Sections 1078, 1080, pages 2478-2481.

In discussing the liability of co-trustees, we quote from 3rd Pomeroy's Equity Jurisprudence, 4th Edition, Section 1082, page 2489, statement of liability of co-trustees:

"A trustee is responsible for the wilful or negligent wrongful acts or omissions—breaches of trust—of his co-trustee to which he consented, or which by his own negligence he made it possible for his co-trustee to commit. Every trustee is, of course, liable for the defaults of his co-trustee in which he has joined or concurred, but his liability then arises from his own actual breaches of trust, and not from those of his fellow-trustee. 'With respect to the liability of a trustee for the acts of a co-trustee, there are three modes in which he may become liable according to the ordinary rules of the court: 1. Where one trustee received trust money and hands it over to a co-trustee without securing its due application: 2. Where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; 3. Where

he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution.' It thus appears that the consent to a co-trustee's breach of trust need not be express. It may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss."

A trustee is thus liable for permitting a breach of trust by its co-trustee, and is certainly entitled to the active intervention of a Court of Equity to prevent any attempted breach.

Point 3.

Impairment of the obligations of the contracts and deprivation of plaintiff of its property, property rights and trust without due process of law.

As is alleged by plaintiff's pleadings the Wharf Company acquired title to the streets between Ninth and Forty-first Streets by the Compromise Decree of 1869 and the Act of the Legislature confirming the same, and to the streets between Thirty-first and Forty-first Streets also by the deed from the Houston & Galveston Wharf & Press Company, which conveyed the streets, and which was confirmed by the same act of the Legislature, which had the right so to do by virtue of its paramount authority over the streets. (R. 4-7, 17-19, 43.)

The Compromise Decree of 1869 not only consolidated and vested in the Wharf Company "all the right, title, interest and claim of every kind and description whatsoever," of the Wharf Company and the City "in and to all the land and ground extending from the shore or ordinary high water mark of the Island of Galveston to the channel of the Bay or Harbor" between and including Ninth Street on the East and Thirty-first Street on the West and "including all the ground known as the flats within said limits," but it likewise consolidated and vested in the Wharf Company "all rights, capacity, powers and claims of said plaintiffs (the

Mayor, Aldermen and Inhabitants of the City of Galveston) to build and erect wharves, and take and receive wharfage therefor, at the end of streets now or hereafter running or extending to said channel." (Heavy type ours.) (R. 18.) It is thus manifest that the Compromise Decree vested in the Wharf Company, not only the streets East of Thirty-first Street, but also "all rights, capacity, powers and claims" that the City then and thereafter had "to build and erect wharves, and take and receive wharfage therefor, at the end of streets now or hereafter running or extending to said channel," and situated West of Thirty-first Street. That this is the purpose, intention and effect of the decree is made certain, if any greater certainty were needed, by the declaration therein contained that "It is further the agreement and intention of the parties that this settlement shall, if practicable, result in and secure the final settlement of all controversies, and prevent future controversy in regard to all the wharf privileges in front of the City of Galveston, and that the whole of said wharf privileges shall be united and consolidated in the present parties hereto." (R. 19.) It is to be borne in mind as a part of the history of the City of Galveston that at the date of said decree the Western limit of said City was at Forty-third Street.

Thus the Wharf Company acquired the streets between Thirty-first and Forty-first Streets both by the Compromise Decree of 1869 and by the conveyance from the Galveston & Houston Wharf & Press Company, both confirmed by the same Act of the Legislature of 1870.

Insofar as these matters are concerned, it was not the intention of the parties to create any new rights by the agreement of 1905, but to determine and declare the rights of the parties arising out of the Compromise Decree of 1869 and the other transactions of that year, by which the Wharf Company acquired certain property from the City Company and property from the Houston & Galveston Wharf and Press Company. There had been disputes between the parties existing for a number of years, concerning the proper construction and effect of those transactions. Special Counsel, having been employed by the City in August, 1889, not to

argue the case, but to investigate and advise upon its interest in the Wharf Company, (R. 8) concluded and so advised that by virtue of the transactions of 1869 and 1870, the City had acquired an undivided one-third of all of the property, including that between Thirty-first and Forty-first Streets, which was represented by said 6,222 shares of stock, he holding that the decree applied between those streets just as it did between Ninth and Thirty-first Streets, but that the City was not entitled to any more stock. (R. 8.) He also held, contrary to the opinion of Judge Stayton in Wharf Company vs. City, 63 Texas, 24 and 25, that the taxes payable on two-thirds of the property should not be deducted until after dividends payable on the stock had been estimated, and in substance, that the private stockholders should bear all of the taxes. (R. 8.) The contrary had been the actual practice from 1884, when the tax case of Wharf Company vs. Galveston was decided, to 1905. (R. 7-8.) Now, so far as these issues are concerned, in the contract of 1905 the Wharf Company conceded the contention of the City's special counsel that under the decree and confirmatory act of 1896, the City was entitled to no more stock than the 6,222 shares and that the Wharf Company owned an undivided interest of two-thirds in the property West of Thirty-first Street just as it did in that East of Thirty-first Street, and that one-third of said property was not taxable, and the City, on the question of deducting taxes vel non before declaring dividends, conceded the correctness of the interpretation of the decree by Judge Stayton in the Supreme Court, 63 Texas, pages 24 and 25. (R. 8-9.) The very language of the agreement of 1905 shows that in these respects the parties were not attempting to create new rights, but simply to agree upon and settle the proper interpretation or construction of the transactions of 1869 and 1870. (R. 23-27.) Certainly, if the City as trustee had filed a suit against the Wharf Company to settle those matters and a decree had been entered, containing the same terms as the agreement of 1905, in these respects, such decree could not have been held void under the provisions of the Constitution of 1876, above mentioned. Certainly, it was not the purpose of those

provisions of the Constitution to prevent the City from settling controversies arising out of a transaction prior to the existence of the Constitution, especially when such settlement was approved by the Legislature. The provision that the Wharf Company could use earnings before declaring dividends, for the purpose of making improvements, paying interest on indebtedness incurred in making improvements, and providing a sinking fund to pay such indebtedness, was also merely an interpretation of the rights of the parties existing in 1869, confirmatory of what had been the practice from the beginning, and declaratory of the law, and no wise in conflict with anything in the Constitution of 1876.

During the time since April 1st, 1869, said property has been improved at an expense of many millions of dollars, wharves, piers, warehouses, grain elevators, railroad tracks, and other improvements have been placed and constructed thereon from Tenth to Forty-first Streets, for use as an entirety, all with the consent, concurrence, approval and active co-operation of the City of Galveston through the directors representing it, a very large and expensive part of said structures and improvements being so placed—upon parts of property that would be occupied by streets if they were opened and said property cannot be equitably partitioned in kind so as to set apart one-third thereof with the improvements thereon of equal value to the other two-thirds, and said property cannot be so partitioned without injuring and damaging the value and utility thereof, all which are now and for many years have been devoted to the public use, and for many years there have passed over the railroad tracks, wharves and piers of plaintiff very large tonnage of interstate and foreign commerce and some tonnage of state commerce and that such will continue in future, the service, rates and charges of plaintiff as to such interstate and foreign commerce being subject to regulation and control of the Interstate Commerce Commission and such intra-state commerce being subject to regulation and control of the Railroad Commission of Texas. (R. 4, 5, 6, 7, 8, 9, 13, 14, 15, 50, 51.)

So much for the showing made by the allegations of

plaintiff's pleadings, among other things, as to the extent and general character of said property.

PARTITION.

We have seen that the question whether a plain, adequate and perfect remedy at law will preclude the court from taking jurisdiction in equity depends upon what were the common law remedies at the time the Judiciary Act was passed in 1789. If, at common law the City should sue out a writ of partition, as the common law takes no notice of trusts, defense could not be made that the property was not subject to partition because held in trust under terms precluding the partition. In case of a writ of partition the sheriff will be directed thereby to summon twelve men as jurors and proceed in a crude way to physically divide the property. None of the equities set up in this bill recognized by Courts of Equity will be noticed or enforced by the sheriff's jury. No allowance whatever or compensation in any way could be made to one joint owner for having expended more in the improvement of property than the other. No other species of equity could be recognized by the sheriff's jury. For a discussion of partition at law and in equity, showing the inadequacy of the legal remedy, except in very simple and uncomplicated cases, see First Story Equity Jurisprudence, 13th Edition, Chapter 14 beginning at page 654. Equity will not decline jurisdiction where the legal remedy is debatable or doubtful. Union Pacific Railroad Company vs. Board, 247 U. S. 282; Wallace vs. Hines, 253 U. S. 66. If the City has the right to partition it can secure the same by cross bill in this case, where all equities can be adjusted. That the right to partition does not exist is manifest on several grounds: First, the City holds only the legal title jointly with plaintiff as co-trustee, and, therefore, has no interest in the property to be partitioned, the beneficial interest being in the present and future inhabitants of the city, subject only to disposition by a four-fifths vote; second, such a partition would be violative of the trust. A trust cannot be defeated by a voluntary sale by the beneficiary, (contrary

to the terms of the trust) by execution sale, or by partition. Gammel vs. Dabney, 20 Texas, 76; Wallace vs. Campbell & Maxey, 53 Texas, 230; Monday vs. Cage, 92 Texas, 433; Cage & Crow vs. Perry, 142 S. W. R. 80; Nichols, Assignee, vs. Eaton, 1 Otto, 727, and cases there cited. We quote from Section 2130, begining at page 4793, 5 Pomeroy's Equity Jurisprudence, 2nd Ed.:

"While the character of the property affords no bar to a partition, there are many cases in which equity will refuse to decree a partition, as where property is charged with some trust or is dedicated to some use which would be defeated by the partition. There can be no partition which will defeat the purpose of a valid trust created by deed or will, nor will equity grant a partition contrary to the expressed desires of a testator. Where, however, all the beneficiaries under a trust consent to a partition, equity may order the same and terminate the trust (but here some of the beneficiaries, the intervenors, are resisting the partition), or may order the property held for the beneficiaries in severalty, provided such termination or holding will not defeat the objects of the trust. Where property is devoted to a public use, no partition detrimental to public right or policy will be permitted, and where property is devoted to a religious or charitable use of such nature that a partition would be especially disastrous, equity will not enforce a division. * * * * *

"The prevailing rule, however, is that the right to a compulsory partition is given for the benefit of co-tenants and may be waived by agreement, and where such a stipulation is an incident to the purchase of lands or other property for the carrying out of a common project to the success of which the preservation of the property as a whole is essential, equity will not compel a partition in violation of the contract."

The partition would violate the contract between the City and the Wharf Company, evidenced by the Decree of 1869, and the agreement of 1905, in which the title to all of the property is consolidated in the Galveston Wharf Company, with the right to manage and control the same so that it owns property in this respect just as the property of any

other corporation, of which no shareholder has the right to demand partition. No such partition can be had except by unanimous agreement of the stockholders or by a winding up and dissolution of the corporation. The foregoing is subject only to the right of the inhabitants to sell their interest in the property or in the stock, upon a four-fifths vote. The plaintiff entered into the contracts and acquired title to the property subject to that contingency only. This is manifest from a reading of the Decree of 1869, as well as of the agreement of 1905. That no thought of a future partition was in the minds of the framers of the Decree is shown by the paragraph quoted by Judge Stayton, 63 Texas, 19, the heavy type being his:

"It is further the agreement and intention of the parties that this settlement shall, if practicable, result in and secure the final settlement of all controversy, and prevent future controversy in regard to all the wharf privileges in front of the City of Galveston, **and that the whole of said wharf privileges shall be united and consolidated in the present parties hereto."**

A partition would be contrary to public policy established by the Decree ratified by the Legislature, which was that the property should be united as one whole, and managed and operated by plaintiff.

In further support of the statement that property will not be partitioned when it will be inconsistent with the terms of the trust or agreement which may be implied, we refer to Freeman on Co-tenancy and Partition, pages 538-539, 2nd Ed., citing Peck vs. Cardwell, 2 Beav. 137; Hunt vs. Wright, 47 N. H., 399; 21 A. & E. Enc. of Law, page 1158; 30 Cyc., pages 185-186. Since the days of Lord Coke partition will not be granted where it will be contrary to the public interest and against public policy. Freeman on Co-tenancy and Partition, Section 438, page 530; 21 A. & E. Enc. of Law, 2nd Ed., page 1163. Some cases are cited by the text writers to the effect that a perpetual agreement between co-tenants not to partition will not be enforced, but we understand such decisions to relate to mere private property not charged with

a public use, and have no application to property of the nature herein involved and held as this property is.

It is the rule of the Supreme Court of Texas as well as of the Supreme Court of the United States that a Railroad Company cannot sell, lease or abandon the use of its property without the legislative consent of the State. G. C. & S. F. vs. Morris, 67 Texas, 699, and authorities cited; State vs. Sugarland Railroad, 163 S. W. R. 1047, (writ of error refused). In the case last cited the Railway Company in abandoning a part of the track which it was ordered by the court to restore, acted under the authority of the Railroad Commission of the State, and it was held that such Commission authority was not sufficient. The rule has been modified by a recent decision of the United States Supreme Court, holding that the State cannot compel the operation of the railroad where it cannot earn its operating costs. It has been the policy of the State of Texas not to grant consents of the above nature by any general law, each particular case being dealt with on its merits by special act. The principles referred to apply with equal force to Wharf property such as is here involved, which the court probably judicially knows is just as important to this and other states as are the railroads. Moreover, by virtue of the Act of the Legislature of August 4th, 1870, authorizing plaintiff to construct and operate railroads (R. 9, 21-22), and the construction and operation by it of railroad tracks and railroads as elsewhere shown, the Galveston Wharf Company is not only a wharfinger and wharf company, but a railroad company, and is under the jurisdiction of the Interstate Commerce Commission and Railroad Commission of Texas. We have only found one case, Railway Company vs. Railroad Company, 38 Ohio State, page 614, where an attempt was made to partition a railroad, wherein it was held while a railroad might be technically within the statutes of partion such statutes as well as the equitable remedy of partition are not intended to apply to railroads because it was the policy of the state to perpetuate the ownership in severalty of railroads without power of alienation. We quote from the opinion:

"Again, as the chief value of such property consists in its use as a public highway, and as it is the interest of the public that each tenant in common should maintain its highway from terminus to terminus, as well over the common right of way as beyond it, we cannot believe that the Legislature contemplated or intended, by permitting such joint ownership and use, to provide thereby a means for the destruction of both or either of the roads, in whole or in part, owned and operated by the parties, by a partition or a sale in partition proceedings, under the statute regulating partitions, passed many years before this species of property had an existence. * * *

"But it is claimed that, independent of the statute, the plaintiff is entitled to have partition in equity, where, as at common law, the right to demand actual division is acknowledged to be absolute and inseparable from an estate in common, coparcenary or joint tenancy, without regard to the fact whether the division of the estate will prove advantageous or ruinous to the co-tenants. The question, however, is still open to inquiry, whether the estate in controversy is within that rule.

"It must be recollected, as above stated, that the case, as presented to us, involves no equitable consideration, other than the mere right of co-tenants to have partition of the common property, so that each may hold his own interest in severalty.

"The difficulty in the case mainly arises from the fact that the public has an interest in the use to which the property is perpetually devoted, and no one will deny that equity will recognize and protect the public interest, and to that end will consider the state of legislation on the subject. * * *

"Neither of the parties to this suit has power to sell and convey, for any purpose, its interest in the subject matter of the suit. They have no power to make partition between themselves, for this would involve the power to make mutual releases and conveyances. Hence, we come to this question. Will equity compel partition between co-tenants, sui juris, who have no power to partition their common property amicably? Partition is completed in equity by mutual releases.

Will equity decree mutual releases between the parties, where, by law, the power to execute them is withheld from the parties? We can find no precedent of the kind. In partition between infants, the execution of releases is postponed by the decree, until the majority of the co-tenants."

The court then quotes from Freeman on Co-tenancy and Partition, Section 427:

"A partition in chancery, like a voluntary partition made by the parties, must be consummated by mutual conveyances. Therefore, no effectual partition can be had in equity against any person not competent to execute a conveyance."

Here the only authority to convey is on a four-fifths vote of all of the qualified voters of the city. For the same reasons the public policy of the state has impelled the decision just cited, by the Supreme Court of Texas in Galveston & Western Railway Company vs. City of Galveston, 90 Texas, 399, that in giving its consent by ordinance to the construction of railroad tracks in the streets of the city it could not prescribe a condition, failure to comply with which would authorize the city to require the removal of the tracks.

We quote the concluding paragraph of the opinion in the Ohio case:

"Our conclusion, therefore, is, that the provisions of this statute, when considered in connection with the fact that power of alienation was withheld from these co-tenants, is inconsistent with the absolute right to demand or compel partition, whereby the usefulness of a part of this section of the road to the successor of the Central Ohio Railroad Company would undeniably be impaired. The legislature did not contemplate or intend that a partition of this property should be made; but, on the other hand, did intend a perpetual joint use of the highway."

In the legislative charter of the Wharf Company there is no limit on the life of the corporation. Here the legislature

intended that the property should be jointly used for wharf and railroad purposes subject only to the single contingency of a disposition of a part thereof by a four-fifths vote of the voters of the city.

Public policy with respect to this property was declared by the Compromise Decree of 1869 approved by the District Court of Brazoria County as being for the public interests, by the Legislature of the State in the Act of 1870, and again in the Act of 1905.

Sale of City's Interest.

While said charter amendment, Section 118, purports to authorize a partition of the property it is manifest from a reading thereof that the ultimate purpose is to accomplish a sale of the City's interest upon a mere majority vote of the qualified voters of said City, instead of a four-fifths vote as required by the Compromise Decree or Contract of April 1st, 1869, in violation of the provisions of said Compromise Decree and the trust thereby established, to the utter destruction of said trust and of the obligations of said contract. That such a sale, or a sale in any manner not authorized by a four-fifths vote of the qualified voters of said City would not only impair the obligations of said Compromise Decree or Contract, but would utterly destroy the same and the trust thereby created and imposed upon the City and this plaintiff, in violation of the contract clause of the Constitution of the United States, and would deprive the plaintiff and the intervenors of their property and property rights in violation of the due process of law clause of said Constitution, we confess does not seem to us to be debatable.

Point 4.

The allegations of plaintiff's pleadings, adopted by the intervenors, setting out the contracts of 1889 and 1916 and the execution thereof, and the passage of the ordinances by the Legislature of Texas, and the amendments to the City Charter of the City of Galveston, adopted May 6, 1905, and averring that the enforcement of said charter amendment would impair the obligations of said contracts and deprive plaintiff of its property and property rights and trust, and its cestuis que trust of their property and property rights in one-third of said property and that plaintiff and intervenors, who were some of its cestuis que trust, that they were without adequate remedy at law, raised Federal questions which required the Court to take jurisdiction of the cause and determine the existence and validity of said contracts, ad sum, and whether the enforcement of said charter amendments would destroy said trust and impair the obligations of said contracts, and deprive said plaintiff and its cestuis que trust, the inhabitants and future inhabitants of the City of Galveston, of their property and property rights all in violation of the contract and due process of law clauses of the Constitution of the United States.

We apprehend that much that has been said in this brief would be rather appropriate to a discussion of the case at a trial upon the merits than to a consideration merely of the issue of whether the pleadings of plaintiff, adopted by the intervenors, raise a Federal question and hence require the Court to take jurisdiction and determine the case upon its merits, but in view of the holding of the Court below that said pleadings do not raise any Federal question, without any explanation or elucidation by the Court of that view, and the contentions of the defendants urged in the Court below, we have felt constrained to present the case in this Court in the manner we have.

Vicksburg Water Works Company vs. Vicksburg, 185 U. S. 65, which was again before the court, styled Vicksburg vs. Water Works, 202 U. S. 453, was a case in which the Water Company had a contract for a term of years to fur-

nish the city with water. On March 9th, 1900, the Legislature passed an act to authorize the city to issue bonds in the amount of $375,000.00 to purchase or construct water works, construct sewerage system, construct city hall, necessary building for a medical college and other purposes. On July 3rd, an election was held in the city, at which it was voted that the city issue its bonds in the sum of $150,000.00 to buy or construct water works, and on November 7th, 1900, the city passed a resolution instructing the Mayor to notify the Water Works Company that the city denied any liability on the contract, that after August, 1900, the city would pay reasonable compensation for the use of hydrants, and instructing the city attorney to take such action as should be necessary to determine the rights of the city in the premises. On December 7th, 1900, the city filed a bill in the State Chancery Court against the Water Company seeking therein to have the contract declared null and void, on the ground, among others, that the city had no authority to enter into the contract. The case in the state court was removed to the Federal Court, and it was there pending on motion to remand. Under these circumstances, in February, 1901, the Water Company filed its original bill in the Circuit Court of the United States to restrain the city from impairing the obligation of the contract, that being the only ground of jurisdiction. On July 3rd, 1901, the Circuit Court holding that there was no Federal question involved dissolved the injunction theretofore granted and dismissed the bill. The Supreme Court in a unanimous opinion reversed the Circuit Court and directed that court to proceed with the case on the merits. We quote from the opinion:

"Whether this act of the legislature of Mississippi, is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7th, 1920, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability

upon any contract for the use of the waterworks and hydrants, and the subsequent (prior) action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the jurisdiction of the Circuit Court as presenting a Federal question. * * * * *

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties: in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

It will be observed that although authority to issue bonds had been granted on July 3rd, 1900, a year had expired and no action had been taken by the city looking toward the sale of the bonds or the construction of the waterworks other than to file a suit in Chancery Court of the State to test the validity of the contract with the waterworks company. It

is respectfully submitted that at least the equivalent of what was done in the Vicksburg case to give the court jurisdiction has been done here. These amendments authorized the defendants without more to attempt to partition the property or condemn the same. All that was necessary after the adoption of the amendments was a simple resolution of the Commissioners, or verbal instructions for that matter, directing the city attorney to proceed.

We apply the language of the court in the Vicksburg case:

"This does not present the mere case of a breach of a private contract to be remedied by an action at law, but discloses an intention and attempt by subsequent legislation of the city to deprive the complainant of its rights under an existing contract, and that unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the plaintiff of its obligations under the contract (in the instant case full performance of the contracts by plaintiff is alleged) as to warrant the city in declaring the city absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of this court." Further than this the bill charges that the defendants will proceed to enforce the amendments.

In Siler vs. L. & N. R. R. Co., 213 U. S. 191, the Court said:

"The Federal questions, as to the invalidity of the State Statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that Court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on legal or state questions only."

This rule has been re-affirmed in the more recent case of Greene vs. L. & I. R. R. Co., 244 U. S. 508, where all of the questions arising under the State law were decided, although

the Federal questions, which gave jurisdiction were not passed on. See also Ohio Tax Cases, 232 U. S., 576; Michigan Central Railroad vs. Vreeland, 227 U. S., 63.

As we have already shown it is no longer an open question that a mere by-law or Ordinance of a Municipal Corporation may properly be considered as a law within the meaning of the contract clause of the Constitution of the United States (Ante, page 70) and these amendments are much more than mere by-laws or Ordinances of a municipality, but purport to have the force and effect of Legislative enactment. It will be observed that the amendment to the Galveston City Charter, Section 118, embodied in the twenty-fifth proposition and adopted May 4th, 1920, commences with the words "The City of Galveston shall have the power, and it is hereby authorized to **compel** the partition and division of the property, real, personal and mixed, owned by the City of Galveston and the Galveston Wharf Company," etc., etc. It is clearly new legislation, and if the enforcement of the same would conflict with any provision of the Compromise Decree of 1869 or the contract of 1905, it would clearly impair the obligations thereof. It not only undertakes to create the right to partition the property contrary to the plain meaning of said Compromise Decree, but to authorize a sale or other distribution contrary to the four-fifths vote provision contained in said decree. We shall ask on final hearing for a decree holding, among other things, that these amendments, so far as they affect the plaintiff and intervenors are to that extent void and that the defendants be perpetually restrained and enjoined from filing suits attempting to partition the property or to in any manner accomplish the sale of the interest therein of the present and future inhabitants of the City of Galveston, except upon a four-fifths vote for some specific purpose, and a Federal Court of Equity having first acquired jurisdiction of the subject matter by the filing of plaintiff's bill in this case, adopted by the Intervenors, may enjoin any and all the parties from instituting or prosecuting suits in any other court or courts either State or Federal, pertaining to such subject matter. Looney vs. East Texas Railroad Company, 247 U. S. 214;

Pacific Live Stock Company vs. Oregon Water Board, 241 U. S. 444; Fisk vs. Union Pacific Ry. Co., 10th Blatchford, 518; Ripley vs. San Diego Land Co., 79 Federal, 657; Union Life Ins. Co. vs. Riggs, 123 Federal, 312; State Trust Co. vs. K. C. P. & G. Ry., et al., 110 Federal, 12; T. & P. vs. R. R. Commission of Louisiana, 144 Federal, 68; French vs. Hay, 22 Wall, 250; Dietzsch vs. Huidekoper, 103 U. S., 494; Gunter vs. Atlantic Coast Line, 200 U. S. 291; Julian vs. Central Trust Company, 193 U. S. 93; Morgan vs. Sturgess, 154 U. S. 256; Prout vs. Star, 188 U. S. 537; Missouri vs. C. B. & Q., 241 U. S. 533; T. & P. Railway vs. Kuteman, 54 Fed., 547.

CLOUD ON THE TITLE.

It is appropriate to say in this connection that we shall also ask that the final decree lift and remove the injurious and damaging cloud alleged in the bill to have been cast on the title of plaintiff by the adoption of said charter amendment. (R. 15.) In view of the maner in which this property is held the assertion of the right to partition does cast a cloud on the title and, as alleged in the bill has already impaired the value of the shares of plaintiff's capital stock, including that held by the City (R. 14-15), and that equity has jurisdiction to remove and prevent such clouds is clear. Hopkins vs. Walker, 244 U. S. 490; Lancaster vs. Cataline Oil Company, 241 U. S. 551; Wilson Cypress Company vs. Del Pozo. 241 U. S. 652; Santa Fe Pacific vs. Lane, 244 U. S. 492; 1 Pomeroy's Equity Jurisprudence,, Section 293, pages 561 564, 565, 566 and 567.

Nor is it necessary that the plaintiff wait, but may file his bill to remove the cloud immediately upon its appearance, though then no bigger than a man's hand. Santa Fe Pacific Railroad Company vs. Lane, 244 U. S., 498.

Any question as to the right of the plaintiff, Galveston Wharf Company, to represent the inhabitants of the City of Galveston in this case becomes immaterial in view of the fact that the intervenors, who have adopted the allegations of the Wharf Company, and pray for the same relief, are all of them inhabitants of said city, some of them being owners of stock

in said Galveston Wharf Company and others not the owners of any such stock.

It is respectfully submitted that this cause should be reversed and remanded with instructions to the District Court to proceed with the trial of said cause on its merits, and appellants pray for an order of this Court reversing said cause and remanding it with such instructions.

J. W. TERRY,
Solicitor for Galveston Wharf Company,
R. J. Calder, et al.,
Appellants.

TERRY, CAVIN & MILLS,
Of Counsel.

APPENDIX.

AN ACT TO INCORPORATE THE GALVESTON WHARF AND COTTON PRESS COMPANY

(Approved Feb. 4, 1854.)

Section 1. Be it enacted by the Legislature of the State of Texas, That Michael B. Menard, Ebenezer B. Nichols and Henry H. Williams and their associates be, and they are hereby incorporated under the name and style of the Galveston Wharf and Cotton Press Company, and under it may transfer their rights by succession and assignment, and shall be persons in law capable of suing and being sued, pleading and being impleaded, in all courts and places whatsoever, and also that they and their successors by the same name and style, shall be in law capable of holding and of conveying any estate, real, personal or mixed, and doing and performing all things which are necessary for the business of said company and not contrary to the Constitution of this State.

Section 2 merely provides that the capital stock of the company shall be not less than One Hundred Thousand Dollars, divided into shares of $100.00 each; and Sections 3, 4, and 5 relate merely to the management of the affairs of the company, provides for a Board of Directors, officers, stockholders, and directors' meetings, etc.

An Act amendatory of and supplementary to an act to incorporate The Galveston Wharf and Cotton Press Company. (Approved Feb. 11, 1860).

Section 1. Be it enacted by the Legislature of the State of Texas, That the Galveston Wharf and Cotton Press Company, may change its name to that of the Galveston Wharf Company, etc.

(Other parts of the Act not material here.)

PARTS OF AN ACT TO INCORPORATE THE CITY OF HOUSTON, AND OTHER CITIES THEREIN NAMED. (Approved January 28, 1839.)

Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assem-

bled, That all the free white inhabitants thereof shall be a body corporate, by the name of the Mayor and Aldermen, and inhabitants of the city of Houston, etc.

Sec. 20. Be it further enacted, That the cities of Galveston, Matagorda, San Augustine and Aransas, are hereby incorporated agreeably to the provisions of the foregoing charter; and it shall be the duty of the Chief Justices of the counties of Galveston and Refugio, to hold an election on the second Monday in February next, for the officers contemplated in the said act."

PARTS OF AN ACT FOR THE INCORPORATION OF THE CITY OF GALVESTON.

(Approved February 5, 1840.)

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That all the free white inhabitants of the city of Galveston shall continue to be a body politic and corporate by the name of the mayor, aldermen and inhabitants of the city of Galveston, etc.

Sec. 19. Be it further enacted, That the corporate limits of the city of Galveston, be for the present and until otherwise provided, all that section of territory lying between seventh street and thirty-first street, including the harbour and anchorage of Galveston, and running from the front line on the bay as defined in the patent or deed to the Galveston Company from the Government of Texas, to the gulf between the streets aforesaid, so as to extend the authority of the corporation over all the territory defined."

PARTS OF AN ACT TO REINCORPORATE THE CITY OF GALVESTON, AND TO GRANT A NEW CHARTER TO SAID CITY, ETC.

(Approved November 10, 1866.)

Sec. 2. That the limits of said city shall, for the present, be all that portion of territory lying between Seventh street on the east, and Forty-third street on the west, etc."

PARTS OF AN ACT TO INCORPORATE THE CITY OF GALVESTON, AND GRANT A NEW CHARTER TO SAID CITY, ETC.

(Approved May 17, 1871.)

Section 1. That the limits of said city shall embrace so much of the island of Galveston from the point thereof on the east, to Fifty-sixth street west, or to include the league and labor of land known as the Menard grant, etc."

"Power and authority are hereby conferred upon the Railroad Commission of Texas, over all public wharves, docks and piers, and all elevators, warehouses, sheds, tracks and other property used in connection therewith, in the State of Texas, and over all suburban Belt and Terminal Railroads in said State, and over all persons, associations and corporations, private or municipal, owning or operating any such Railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property; and it is hereby made the duty of the said Railroad Commission to fix and adopt all necessary rates, charges and regulations to govern and regulate said persons, associations and corporations," etc. (Art. 6677a, McIlwane's Complete Texas Statutes, Acts of 1911, 157.)

SUBJECT INDEX.

INDEX OF AUTHORITIES.

IN THE

Supreme Court of the United States

October Term, 1922.

No. 19

GALVESTON WHARF COMPANY,
R. J. CALDER ET AL.,
Appellants,
vs.
CITY OF GALVESTON ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR CITY OF GALVESTON ET AL., APPELLEES.

This is a suit between citizens of Texas. While Appellants urge that the acts complained of contravene both the due process clause and the contract clause, it seems to us that only the contract clause of the Constitution is involved. The rights it is claimed the City has violated by legislation, and is threatening to violate, are those that arose out of and have their foundation in the Consent Decree of 1869 as modified by the Contract of March 9, 1905.

The main contention, in so far as the question of jurisdiction is involved, rests on the determination whether the provision in the Decree of 1869, that the interest and stock of the City in the Wharf Company

> "shall be inalienable and not subject to conveyance assignment, transfer, pledge, mortgage, or any liability for debt whatever, in any other manner than by the vote of four-fifths of all the qualified voters of said City in favor of some clear and specific proposition therefor,"

is a valid contract with an inuring to the benefit of the Wharf Company, the obligations of which contract were impaired by the City's passing and threatening to carry out any one or all of the powers vested in the City by the amendments.

The prayer in the original bill adopted by Intervener discloses and summarizes the purpose of the suit, the material portion of the prayer being as follows:

> "That upon final hearing hereof said charter amendments in so far as they affect or attempt to affect the plaintiff, the property hereinbefore described and the ownership thereof by plaintiff, be cancelled and decreed to be void, and that defendant City, and the other defendants and each of them, and their successors in office be perpetually enjoined from attempting to enforce said charter amendments by filing or prosecuting suit or suits, proceeding or proceedings, for partition, condemnation, or in any other manner whatsoever, against plaintiff or against the property hereinbefore described or any part thereof, and that the City be perpetually enjoined from attempting to commit a breach of the trust imposed on it by the Decree of April 1, 1869, and the Act of the Legislature confirming the same, and accepted by it, by attempting in any manner to interfere with plaintiff in the possession, control, ownership and operation of the property herein described

or attempting to acquire the said property or any part thereof, or to partition the same, or attempt to dispose of same or any part thereof, or to interfere with the same in any way, except when authorized to do so by a vote of four-fifths of the qualified voters of said city in favor of some clear and specific proposition."

SUMMARY OF AMENDMENTS.

The amendments have the force of legislative enactments, as they were adopted in keeping with the Home Rule provision added to the Texas Constitution in 1912.

In so far as Appellants are concerned by the 7th amendment, it is provided that the City "shall have the power to acquire by . . . condemnation or otherwise . . . and when so acquired . . . to sell . . . and encumber . . . the property . . . owned jointly by the Galveston Wharf Company and the City . . . provided no sale . . . mortgage or encumbrance . . . shall be made . . . unless the same shall have been submitted to and authorized by the vote of a majority of the qualified voters." . . . This amendment further condensed, grants the power to the City to condemn the property, and, if acquired, to sell or mortgage the property when authorized by a majority vote of the people.

The 8th amendment makes no reference to the Wharf Company. This section provides that "whenever the City may determine to purchase or acquire any public service or public utility the City may obtain funds for the purpose of purchasing or acquiring the same and paying the compensation therefor by issuing bonds . . . and shall secure the same by fixing a lien upon the property . . . so acquired by condemnation, purchase or

otherwise," making the property alone liable for the bonds, "provided . . . that no purchase or expenditure shall be made under this section unless . . . submitted . . . to a vote of the qualified voters."

The 9th amendment provides that "in the event of the acquisition . . . by condemnation of the property owned jointly . . . the City . . . shall, and it is hereby authorized to surrender . . . stock . . . now owned and held by the said City, . . . and said City shall retain out of the purchase price its one-third interest therein, and the Galveston Wharf Company and the City of Galveston shall adjust any and all rights . . ., and said City is also hereby authorized to invest the residue . . . for the purpose of (a) paying . . . indebtedness, or (b) raising the grade . . . and all other kinds of protective work, or (c) other public purposes . . . as may be determined by a majority of the qualified voters." It was thought in drafting the amendment that in case the property was condemned it might have to be done as a whole, which accounts for the provision in respect to the City's retaining out of the proceeds its part after adjusting equities. This amendment may be condensed by saying that it authorizes the City, in case the property is condemned as a whole, to retain its portion and apply it to payment of its debts or the doing of protective work or for other public purposes when authorized by a majority of the voters.

The 25th proposition provides: "The City of Galveston shall have the power, and it is hereby authorized to compel a partition and division of the property . . . owned by the City of Galveston and the Galveston Wharf Company jointly, and to sell . . . pledge, mortgage or encumber the same or any part thereof, when authorized

by a majority . . . voting at a special election called for such purpose, in favor of some clear and specific proposition therefor, and provided further that the Board of Commissioners are authorized to institute and prosecute a suit for the partition of such property, as provided in the statutes of the State of Texas, and from time to time submit to the qualified voters of said City . . . a proposition for the lease, sale . . . pledge, mortgage and encumbrance of the whole or any part of the property . . . and provided . . . the City of Galveston shall have the power to expend . . . the proceeds . . . for the purpose of (a)paying . . . indebtedness, or (b) raising the grade, . . . or other public purposes . . . as may be determined by a majority of the qualified voters, provided . . . the City is authorized . . . to surrender to the Galveston Wharf Company the stock in said corporation now owned and held by it as representing the undivided one-third interest of said City in said property." This proposition may be condensed into a statement that it authorizes the City to partition, and to dispose of its interest on a majority vote of the people. This amendment was drawn in the terms of Art. 6096, Texas Rev. Stat. (1911), which provides that "any joint owner or claimant of any real estate, or of any interest therein, may compel a partition thereof between the other joint owner or claimants thereof in the manner provided in the succeeding articles of this chapter." Art. 6116 reads as follows: "Both owners of personal property may be compelled to make partition between them in the manner provided in the succeeding articles of this chapter." To make this amendment effective, the Board of City Commissioners must authorize a suit to be brought under the statutes of the State.

POINT 1.

The writ of injunction will not be granted by any Court of the United States to restrain a Legislative Body from exercising its legislative discretion.

In order to make the amendments effective, the Board of City Commissioners must perform two legislative acts: determine which of the powers conferred by the amendments will be exercised, then authorize and direct, either by ordinance or resolution, either that a partition or condemnation suit be filed or an election be held.

Courts refrain from interference until the legisative discretion is actually exercised. The rule and the reasons therefor are stated in New Orleans Water Works Co. vs. New Orleans, 164 U. S. 471, 41 L. Ed. 518, as follows:

> "If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will therefore tend to protect the plaintiff in its rights, our answer is that a court of equity can not properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating

upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. Chicago vs. Evans, 24 Ill. 52, 57; Des Moines Gas Co. vs. Des Moines, 44 Iowa 505, 24 Am. Rep. 756; 1 Dill. Mun. Corp., sec. 308, and notes; 2 High, Inj., sec. 1246. If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement. Page vs. Baltimore, 34 Md. 558, 564; Baltimore vs. Radecke, 49 Md. 217, 231, 33 Am. Rep. 239.

"As no decree can be properly rendered that will affect the rights of the beneficiaries named in the ordinances enacted before this suit was commenced, —such beneficiaries not being before the court,— court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted and which are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of

actions. But that circumstance cannot justify any such decree as it asks.

In New Orleans Water Works vs. New Orleans, supra, Des Moines Gas Co. vs. Des Moines, 24 Am. Rep. 756, 44 Iowa 505, is cited with approval. In the Des Moines case plaintiff, claiming to have by contract with the city the exclusive right to lay gas pipes and light the streets, sought to restrain the city from passing an ordinance to annul such contract and to grant like rights to others. The court held that it is not within the province of the judiciary to interfere with and arrest the passage of such an ordinance, because in passing the ordinance the municipality is acting in its legislative limits.

In Alpers vs. San Francisco, 32 Fed. 503, complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract with the city for the removal of dead animals.

Justice Fields said:

> "The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. . . . The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion,

whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

Unless and until the Board of City Commissioners takes some action putting one or more of the amendments into effect, this suit is premature.

POINT 2.

The writ of injunction will not be granted by any Court of the United States under the due process or contract clause of the Constitution to restrain the enforcement of a legislative enactment unless and until a real controversy arises as to the effect or construction of these provisions of the Constitution.

No case will arise under the Constitution unless and until the City has determined which one of the amendments it will seek to make effective, and will not then arise under the partition or condemnation amendments unless and until a state court directs that the property be condemned or that it be partitioned. A case will not arise under the amendment authorizing a sale unless the City undertakes to sell and deliver its interest on less than a four-fifths vote of th epeople. It may be that the state courts will decide that the City has neither the right to condemn nor the right to partition, or it may be that a majority of the inhabitants of the City will refuse to direct the sale or mortgage of the City's interest. Until these contingencies are passed, this is a moot case. We submit it makes no difference whether the amendments be construed merely as repudiating the Decree of 1869, or whether they create rights and duties in the City antagonistic to the terms of the Decree, because until the City determines which one of the amendments it will seek to

enforce and then puts it into effect, no case has actually arisen. It is clear that the amendments authorizing either a condemnation or partition are to be enforced through the state courts. If the decision is against Appellants, a case for review by this Court on writ of error,, it may be, will have arisen. And it is clear that the amendment authorizing a sale or mortgage on less than a four-fifths vote of the people will not be effective until a vote is had and less than four-fifths authorize the sale of the City's interest and the City undertakes to sell and deliver under such authorization. If an injunction is granted along the lines sought, the effect, in so far as the condemnation and partition amendments are involved, would be to prevent the state courts from passing on the questions, because they might erroneously decide questions involving the Constitution of the United States. If an injunction is granted as prayed for, in so far as the other amendment is involved, the effect would be to prevent the people from voting under this amendment. This court has discussed the point here suggested upon various states of fact.

In Defiance Water Co. vs. City of Defiance, 191 U. S. 184, 48 L. Ed. 140, the Water Co. filed a bill against the city, claiming a rental contract with the company was impaired by an ordinance denying the validity of the contract. In dismissing the bill, the court, amongst other things, said:

> "We have repeatedly held that 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And

it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground.' Western U. Teleg. Co. vs. Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867; Little York Gold-Washing & Water Co. vs. Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn vs. Portland Gold Min. Co. 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222; Shreveport vs. Cole, 129 U. S. 36, 32 L. Ed. 589, 9 Sup. Ct. Rep. 210; New Orleans vs. Benjamin, 153 U. S. 411, 424, 38 L. Ed. 764, 769, 14 Sup. Ct. Rep. 905 and 909.

"In the case last cited we said:

" 'The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require (Chicago & A. R. Co. vs. Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636, 1 Sup. Ct. Rep.

614, 617); and if there be ground for complaint of their decision, the remedy is by writ of error under Sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). Congress gave its construction to that part of the Constitution by the 25th section of the judiciary act of 1789 (1 Stat. at L. 85; Chap. 20), and has adhered to it in subsequent legislation.' . . .

"Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional.

"Moreover, the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so. Robb. vs. Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 Sup. Ct. Rep. 544; Missouri P. R. Co. vs. Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 536, 543, 16 Sup Ct. Rep. 389.

"And, we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. Chicago & A. RR. Co. vs. Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636, 1 Sup. Ct. Rep. 614, 617; Shreveport vs. Cole, 129 U. S. 36, 32 L. Ed. 589, 9 Sup. Ct. Rep. 210; Neal vs. Delaware, 103 U. S. 370, 389, 26 L. Ed. 567, 571; New Orleans vs. Benjamin, 153 U. S. 411, 424, 38 L. Ed. 764, 769, 14 Sup. Ct. Rep. 905.

"If error supervenes, the remedy is found in sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575).

"The present case strikingly ilustrates the applicability of these well-settled principles. The preliminary injunction was dissolved by the court by which it was granted, and the city's suit was dismissed by the highest judicial tribunal of the state.

"We regard this bill as an attempt to evade the discrimination between citizens of the same state, and suits between citizens of different states, established by the Constitution and laws of the United States, by bringing into the circuit court controversies between citizens of the same state,—an evasion which it has been the constant effort of Congress and of this court to prevent (Bernards Twp. vs. Stebbins, 109 U. S. 341, 353, 27 L. Ed. 956, 960, 3 Sup. Ct. Rep. 252; Shreveport vs. Cole, 129 U. S. 36, 44, 32 L. Ed. 589, 592, 9 Sup. Ct. Rep. 210); and are of opinion that it should have been dismissed for want of jurisdiction."

In Cincinnati vs. Cincinnati Traction Co., 245 U. S. 446, 62 L. Ed. 389, it will be noted that the court, in the majority opinion, modified the decree appealed from in so far as it had enjoined the city from the institution of court proceedings. The court enjoined the enforcement of ordinances prior to the adjudication of the controversy. This, it seems to us, is tantamount to a holding that a court of the United States should not enjoin a city from bringing an action to enforce a legislative enactment through the courts, although the enactment in terms should repudiate the obligation of a contract.

See St. Paul Gas Light Co. vs. City of St. Paul, 181 U. S. 142, 45 L. Ed. 788.

In Des Moines vs. Des Moines Railway Co., 214 U. S. 179, 53 L. Ed. 958, the court said:

> "The resolution begins with a recital that questions as to the Railway Company's rights have been raised and ends with the direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We can not take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks."

See also Art. 1242, U. S. Compiled Statutes, Judicial Code, Sec. 265, R. S. 720, which reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Essanay Film Co. vs. Kane, 66 L. Ed., decided April 10, 1922, construes this aritcle.

POINT 3.

The writ of injunction will not be granted by any Court of the United States to restrain the enforcement of a legislative enactment merely because it is illegal, or unconstitutional, but only when further circumstances are shown which bring the case within some clear ground of equity jurisdiction.

Aside from alleging that the amendments violate the due process and contract clauses of the Constitution, the bill, stripped of its surplusage and historical averments,

alleges, in substance, that the claim by the City that it has the right to partition or condemn casts a cloud on the Company's title and impairs its credit; that the publication of the amendments and the agitation for their adoption have impaired the value of the Company's shares; that the amendments, as purported parts of the charter, will retard plaintiff in the development of its property; injure the future inhabitants of the city, for whom the Company is a trustee; that the amendments will be a constant threat and menace to the Company in the enjoyment of its property; and that defendants may attempt to partition or condemn the property by proceedings in the state courts, where the equities can not be adjusted.

In Texas there is no distinction between suits at law and in equity. Appellants could, in either a condemnation or a partition suit, set up as equities as well as the illegality of the amendments as a defense.

In Boise Artesian Co. vs. Boise City, 213 U. S. 276, 53 L. Ed. 796, the court said:

> "It is quite possible that, in cases of this sort, the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding. . . .
>
> "It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.

"These decisions make it clear that an injunction ought not to be granted unless the bill, besides alleging illegality and unconstitutionality of the ordinance imposing the license fee, sets forth other circumstances which bring the case within some acknowledged head of equity jurisdiction. The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises.

"But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the rigght to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interest of both parties.

"It is true that the bill contains a vague allegation that the city has threatened to remove the company's pipes and works from the city, but no facts whatever are alleged showing such a threat. The city does not speak except by its council, and nothing has been said or done by them in this direction. On the contrary, the imposition of the license fee and the bringing of a suit for its recovery contemplate continuance, and not restraint, of the business of the company. . . .

"Nor do we think that the ordinance casts a cloud upon the title of the company to its franchises. It is

not a lien upon them or upon any other property of the company. The city's only remedy is that which it has employed,—an action at law for the collection of the license fee. The plaintiff's real point here is not that the ordinance imposing a license fee casts a cloud upon its title, but that the reason alleged to have induced the ordinance, namely, the city's claim that the company has no more than a mere permission to occupy the streets, unfavorably affects its property and impairs its credit. But we cannot restrain a belief or an expression of it, and we are not asked to. We are asked only to restrain an ordinance which in no way fixes a lien or cloud upon the plaintiff's title. It is possible that the ordinance imposing the license fee could be sustained without passing upon the nature of the company's tenure of its privileges. On the other hand, it might be condemned without regard to that consideration. Here is a case where every possible defense to the collection of the license fee which has been suggested by the company is available to it in the action at law pending in the courts of the state of Idaho, and there is no reason whatever shown why the law should not take its course. Presumably, the company, on the ground of diversity of citizenship, might have removed the case from the state court to the circuit court of the United States, if the attempt had been seasonably made. If, however, the litigation continues up to the court of final resort of the state of Idaho, and all claims under the Constitution of the United States are seasonably and properly made in the state courts, and are denied, then the company would be entitled to a review by this court of the judgment of the state court."

We have copied the foregoing for the purpose of showing that the general rule is that the writ of injunction will not issue to restrain the enforcement of an ordinance merely because it is alleged to be unconstitutional, but

only when further circumstances are shown which bring the case within some clear ground of equity jurisdiction. No fixed rule has been or could be laid down by which to determine what further circumstances must be shown. Each case must stand on its own bottom. "Undoubtedly," said Mr. Justice Holmes, in City of Dawson vs. Columbia Ave., etc., Co., 197 U. S. 178, "the decisions on the two sides of the lines are very near to each other." Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S. 65, relied on by Appellants, goes far in sustaining jurisdiction, but the facts being different, it does not control the case at bar.

Does the bill in the instant case show, in addition to the allegation of unconstitutionality, sufficient circumstances which bring the case within some clear ground of equity jurisdiction requiring the issuance of a writ of injunction?

On page 42 of Appellants' brief it is said:

> "Bases for the exercise by the Federal Court of its equity jurisdiction herein; prevention of the impairment of the obligations of the contracts pleaded by Appellants and of the taking of Appellants' property without due process of law; enforcement of the trust created by the Decree and Contract of 1869 and recognized and continued by the Contract of 1905 and prevention of the violation and destruction of said trust; clouding Appellants' title by the charter amendment providing compulsory partition."

Cloud on Title.

While equity courts have jurisdiction to remove clouds from titles, jurisdiction will not be exercised unless the facts alleged show that a cloud has been cast on the title

and that the remedy at law for its removal is not plain, adequate and complete. The allegations do not show a cloud. Phelps vs. Harris, 101 U. S. 370, 25 L. Ed. 855, 32 Cyc. 1314. Moreover, equitable grounds must be shown clearly requiring the interference of an equity court, because "the proper forum to try titles to land is a court of law, and this jurisdiction can not be withdrawn at pleasure and transferred to a court of equity under the pretense of removing clouds from title." Phelps vs. Harris, supra. The trespass to try title statutes of Texas (Rev. Stats. 1911, Arts. 7731 to 7768) provide an adequate remedy for the removal of clouds from title.

On this point the instant case does not materially differ from Devine vs. Los Angeles, 202 U. S. 313, 50 L. Ed. 1046, where complainants, residents of California, filed a bill in the Federal Court against the City of Los Angeles alleging that certain acts of the legislature and provisions of the city's charter were void under the Federal Constitution and clouded their titles to certain lands. In dismissing the bill for want of jurisdiction, it is said:

> "We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title, or, invoking equity interposition on the ground of the removal of clouds, that decrees may be sought adjudging statutes unconstitutional and void. If it were true that the statutes and charters referred to in the bill were unconstitutional, as alleged, they were void on their face, and could not constitute a cloud on complainants' titles.
>
> "The test as to when a cloud is or is not cast, as stated by Mr. Justice Field, then chief justice of California, in Pixley vs. Huggins, 15 Cal. 127, and reasserted in Hannewinkle vs. Georgetown, 15 Wall. 547, 21 L. Ed. 231, is undoubtedly applicable and de-

monstrates that the assertion of unconstitutionality cannot be resorted to to maintain Federal jurisdiction as constituting a cloud. The averment of unconstitutionality in such circumstances is a mere pretext to obtain that jurisdiction."

The Trust.

Much that has been said has application to the claim that the court should take jurisdiction to enforce the alleged trust and to prevent its violation and destruction. It is claimed briefly that the Wharf Company, by the Decree of 1869, was made a co-trustee to possess, manage and control the property and pay the net revenue to the City to be expended for the benefit of the inhabitants until four-fifths at an election should authorize the alienation of the City's interest. It is urged that the court should take jurisdiction to enforce this trust and to prevent its destruction by the enforcement of the charter amendments authorizing condemnation, partition or alienation of the City's interest by only a majority vote of the inhabitants. The City claims that no trust was created by the Decree, but if one does exist that it may be lawfully destroyed by the State, and moreover that the allegations are insufficient to show that a Federal equity court can or should take jurisdiction to grant an injunction. It is settled, in so far as the inhabitants of the City (the beneficiaries of the trust, of whom Intervenors are some) are concerned, that they have no rights that the State can not take away. Hunter vs. Pittsburg, 207 U. S. 161, 52 L. Ed. 151, settles this. In this case the court said:

"For the purposes of executing these powers properly and efficiently they are usually given the power to acquire, hold and manage personal and real prop-

erty. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Coinstitution may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

It occurs to us that if the inhabitants of the city who are the beneficiaries of the trust can not lawuflly prevent the State from making any disposition it desires of this public property, the trustee can assert no greater rights.

The alleged trust was not created for the benefit of the Wharf Company, but for the inhabitants.

It is the further contention of the City, however, that no trust was created in the sense that that term is used in the books. None of the essential elements of a trust, strictly speaking, is present. There are no apt and clear words showing an intention to create a trust as is generally required. 39 Cyc. 62, 75. There is no declared object or purpose other than to combine public with private property in conducting a wharf company. It seems to us that the provisions of the decree in reference to a trust amount to nothing more than a declaration that the parties plaintiff, as the representatives of the City, did not individually own the stock and one-third of the consolidated property, but that they held the same in their representative capacity for the then and future inhabitants just like the mayor and aldermen of any city hold a city's property devoted to public use.

But it is urged that in the tax suit of Wharf Company vs. City, 63 Texas, 14, and in the garnishment suit of Hitchcock vs. Wharf Co., 50 Fed. 263, it was ruled, in effect, that plaintiff became a "co-trustee" with the City for the present and future inhabitants. In the tax case it was decided (a) that the decree vested title in the City to an undivided one-third of the property consolidated by the Decree; and (b) that the City's one-third interest was property owned and held in trust for public purposes and therefore not taxable by the City because the same was exempt from taxation under Sec. 1, Art. 8, and Sec. 9, Art. 11, of the Constitution.

In the garnishment suit of Hitchcock vs. Wharf Co. Judge Woods, sitting as a circuit court for the Eastern

District of Texas, ruled (a) that the city held its interest in the Wharf Company in trust under this decree; (b) that the decree got its validity only from the confirmatory act of the Legislature; and (c) held in line with the subsequent decision in 63 Texas, 14 (the tax suit) that it was public property devoted to a public use and could not be subjected to "any liability for debt whatever." In this case Hitchcock claimed that it was not public property, but held for profit and, not being necessary to carry on the city government, it was liable for the city's debts. Judge Woods treated it as public property devoted, like streets, to a public purpose. He said, p. 271:

> "The legislature, by the same act, directed that the proceeds of the sale" (he treated the consolidation as a sale) "should be held by the city on the same trust, substantially, as the property sold, namely, for the use of the present and future inhabitants of the City of Galveston and should not be liable for its debts."

These cases, further condensed, hold that although the City's interest was, by the decree, consolidated with the interests of the private stockholders in a corporation, it was still public property not subject to taxation and not subject to sale for debt. It is true that the decisions declared in line with the decree that the property was to be in trust for the benefit of the then and future inhabitants, but we submit neither of the opinions holds that it was to have a different status from any other public property belonging to a municipal corporation. Judge Woods, it will be noted, in the above excerpt, said that the Legislature directed that, "It should be held by the City on the same trust substantially as the property sold." The properly sold, or rather consolidated, was public streets. He meant, therefore, that it was held on the same kind

of trust that the City holds its public streets. Isn't all public property belonging to a municipal corporation held on this same kind of trust for the benefit of the inhabitants? Wherein does the City's holding of its interest differ therefrom? Nor does the fact that the City's interest was made inalienable except on a four-fifths vote of the people give this property a different trust status from that of other public property. This provision was perhaps intended either as an attempt to prohibit its alienation or to provide one method whereby it could be disposed of. If the Legislature should pass a law authorizing cities to dispose of their public halls when authorized by a four -fifths vote of the people, would they be held any more or any less in trust for the inhabitants until they were disposed of? The restriction or limitation on alienation does not change the character of the property or the conditions on which it was held. Nor was its declared status made diferent by reason of the fact that its possession, management and control was vested in the Wharf Company. Of course, there is a question whether the management, control and possession of the City's interest can be taken from the Wharf Company contrary to the terms of the Decree and against its wishes, but the fact that such a question must be decided does not create out of the arrangement a trust. This is a question of contract. But even if there is a trust, the beneficiaries, the inhabitants, have no standing under Hunter vs. Pittsburg, supra, to prevent the State from doing whatever it wishes with this public property.

But even if it be held that the Wharf Company is a trustee for the inhabitants of the City and that it is entitled to have the alleged trust enforced, it does not follow that a writ of injunction is the proper remedy. A case

must not only be made requiring the aid of a court of equity, but also the necessity for a writ of injunction must be shown. Neither the Wharf Company nor the inhabitants need the aid of a court of equity to enforce the alleged trust, because it is being enforced now without hindrance by the City. The City has not yet disturbed the Company in its possession, management and control of the property.

Estoppel.

The allegations of estoppel will not be considered as a ground for jurisdiction, because estoppels are available at law as well as in equity. In Weber vs. Hertzell, 230 Fed. 965 (Eighth Circuit), the court approved a case dismissing a bill where estoppels were alleged as a ground of jurisdiction. After citing a number of United States Supreme Court decisions, it is said: "They all proceeded up on the theory that there were independent equities in the bills aside from the question as to whether they were equitable estoppels." The rule is summarized in Wehrman vs. Conklin, 155 U. S. 314, 39 L. Ed. 167, where the court quoted the following from an earlier case:

> "All that can properly be said is, that in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law."

These decisions, we submit, eliminate from consideration the allegation of estoppels as a ground of jurisdiction. If this view is correct, no further consideration of the allegations in respect to estoppels is necessary, as the sole question for decision is whether the district court should take jurisdiction.

POINT 4.

The writ of injunction will not be granted by the Courts of the United States by reason of the contract clause of the Constitution to restrain the condemnation of private property for a public use.

In Pennsylvania Hospital vs. Philadelphia, 245 U. S. 20, 62 L. Ed. 124, the court considered a case where the Pennsylvania legislature passed a law that engendered a contract with the hospital not to open any street through the hospital grounds without the consent of the hospital authorities. This act was passed in 1854 and fully complied with by the hospital authorities. In 1913, streets were opened contrary to the agreement. The court in a unanimous opinion in holding the contract void, said:

> "There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot, by virtue of the contract clause, be held to have devested themselves by contract of the right to exert their governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties. Boston Beer Co. vs. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Stone vs. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co., U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; Douglas vs. Kentucky, 168 U. S. 488, 42 L. Ed. 553, 18 Sup. Ct. Rep. 199; Manigault vs. Springs, 199 U. S. 473, 50 L. Ed. 274, 26 Sup. Ct. Rep. 127; Texas & N. O. R. Co. vs. Miller, 221 U. S. 408, 55 L. Ed. 789, 31 Sup. Ct. Rep. 534. And it is unnecessary to ana-

lyze the decided cases for the purpose of fixing the criteria by which it is to be determined in a given case whether a power exerted is so governmental in character as not to be subject to be restrained by the contract clause, since it is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation, for a public purpose, comes within this general doctrine. Charles River Bridge vs. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; West River Bridge Co. vs. Dix, 6 How. 507, 12 L. Ed. 535; New Orleans Gaslight Co. vs. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, 41 L. Ed. 1166, 17 Sup. Ct. Rep. 718; Offield vs. New York, N. H. & H. R. Co., 203 U. S. 372, 51 L. Ed. 231, 27 Sup. Ct. Rep. 72; Cincinnati vs. Louisville & N. R. Co., 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. Rep. 267."

Long Island Water Supply Co. vs. City of Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, is a controlling case on the question of the City's right to condemn the Wharf Company's property in the face of the decree. In this case the Water Co. entered into a cantract with a municipality to supply the town with water, the town agreeing to pay for hydrants at a specified rate for a period of 25 years. The town was made a part of Brooklyn and the contract continued, by a legislative enactment, until the city should purchase or acquire the property of the Water Co. The legislature later passed an act authorizing the city of Brooklyn to condemn the property of the company. Proceedings through commissioners were had valuing the property, including the contracts that the company had. The Water Co. claimed that this condemnation proceeding violated the contract clause in that there was an obligation to purchase water for the 25-year period. It

was contended that the municipality could not, by any direct action, release itself from this contract and that it could not, therefore, accomplish the same result indirectly by proceedings in condemnation. The court said:

> "We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the waterworks might be taken by condemnation. And so the contention is practically that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and therefore operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it."

The court held that the property, including the contracts, could be condemned and that by so doing no provision of the Federal Constitution was violated.

It seems to us, when the Pennsylvania Hospital case and the Long Island Water Works case are considered in the light of the holdings that the questions of necessity and proper extent of a taking are legislative, they clearly hold that the City of Galveston is,in nowise, prohibited and could not be prohibited from condemning the property. The court said in Sears vs. Akron, 62 L. Ed. 689, 246 U. S. 242:

> "Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article 1, Sec. 10, of the Federal Constitution, and the 14th Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore, that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial (Hairston vs. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008), the necessity and the proper extent of a taking is a legislative question (Shoemaker vs. United States, 147 U. S. 282, 298, 37 L. Ed. 170, 184, 13 Sup. Ct. Rep. 361; United States vs. Gettysburg Electric R. Co., 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; United States vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 65, 57 L. Ed. 1063, 1076, 33 Sup. Ct. Rep. 667). The legislature may refer such issues, if controverted, to the court for decision (Pittsburg C. C. & St. L. R. Co. vs. Greenville, 69 Ohio St. 487, 69 N. E. 976)."

In Cavanaugh vs. Looney, 63 L. Ed. 179, the court refused to enjoin the Attorney General and Board of Regents of the University of Texas, under asserted violations of the equal protection and due process clauses, from condemning certain lands needed by the University. The court said:

> "When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegations of threatened 'irreparable loss and damage' appear fanciful."

The court also held that the attack on the statute could be and should be set up "before the state court where defendants intended to institute condemnation proceedings."

POINT 5.

The writ of injunction will not be granted by the Courts of the United States under the contract clause to restrain the enforcement of a void contract.

Judge Wood held in the Hitchcock garnishment case, 50 Fed. 263, that the Compromise Decree of 1869 got its validity solely from the ratifying act of the Legislature. This decision was rendered before the Decree was modified by the Contract of 1905. No doubt it will also be held that the Contract of 1905 likewise got such validity as it has solely from the ratifying act of the Legislature. But whether the Decree be regarded wholly or in part as a contract or as a judgment or as a legislative act, it is the contention of the City that the portion thereof wherein it is provided that the interest and stock of the City

> "shall be inalienable and not subject to conveyance, assignment, transfer, pledge, mortgage, or any liability for debt whatever, in any other manner than

> by a vote of four-fifths of all the qualified voters of said City in favor of some clear and specific proposition therefor."

was void when entered and that the Legislature was without power to give it validity, and also that the Legislature was without power to give validity to the Contract of 1905 modifying the Decree. Appellants claim the Decree as modified by the Agreement of 1905, and especially that portion quoted above, is a valid contract protected from impairment under the contract clause of the Federal Constitution.

We will assume that it is a contract, although there may be some question about this. In Elliott on Contracts, Vol. 3 Sec. 247, it is said:

> "A judgment is not a contract in the constitutional sense. A judgment or decree by consent comes nearer to a contract than any other, but even such is only the result of an antecedent contract, liability or penalty." (Davidson vs. Richardson, 89 Pac. 742).

It is elementary that the Federal Constitution does not protect contracts which are invalid or illegal. 6 R. C. L. 316. And it is also settled that,

> "The word 'contracts' in Sec. 10 of Article 1 of the Constitution is used in its usual or popular sense, as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' (express or implied) 'to its terms is of its very essence'." (Crane vs. Hahlo, 66 L. Ed., decided Feb. 27, 1922.)

The City claims that the decree making the City's interest inalienable is void for the following reasons:

(a) **The Legislature could not by contract divest itself of the power and duty to legislate in respect to the City's**

interest in the Wharf Company, and invest such power and duty in four-fifths of the qualified voters of the City.

It has been made the right and duty of the Legislature in Texas to exercise almost unlimited control over its municipal corporations and their public property. Blessing vs. City of Galveston, 42 Texas 657; Brown vs. City of Galveston, 97 Texas 1; Hunter vs. Pittsburg, 207 U. S. 161. And when the claim is made that there has been a surrender by contract of this or any other power of government, the existence of such a contract must clearly and unmistakably appear and all doubts will be resolved in favor of the continuation of the power. Home T. & T. Co. vs. Los Angeles, 211 U. S. 282, 53 L. Ed. 176.

The obligation that the portion of the Decree undertakes to impose on the Legislature and the Board of City Commissioners is that they will not exercise the powers and duties imposed on them by the Constitution. It was evidently the purpose and intention of the provisions of the decree making the City's interest inalienable to vest in four-fifths of the inhabitants the right and power to determine when, to whom, for what consideration, and in what manner the City's interests might be disposed of. Is this not a pure and simple delegation to the people of the power to legislate? If this power could be delegated to four-fifths, why could it not be delegated to one-fifth or to one man or to any other agency? The Legislature can not divest itself of the power and duty to legislate, and invest such power in the people or anyone else. State vs. Swisher, 17 Texas 441, decided in 1856 and followed in Ex Parte Mitchell, 177 S. W. 953 (Texas Supreme); Lyle vs. State, 193 S. W. 680 (Texas Cr. Ap-

peals); In re Municipal Suffrage to Women, 23 L. R. A. 113 (Mass.). The Texas decisions perhaps differ from the weight of authority. It is believed, however, that the Texas cases cited are in point and, as we understand it, will be accepted by this court as to the effect of the Texas Constitution and laws.

(b) **The provision in the Decree of 1869 against alienation of the City's interest in any manner than by a vote of four-fifths of all the qualified voters of the City is void, because in contravention of the rule against unlawful restraints on alienation and the allowance of perpetuities.**

In urging this point, we suppose that it will be found as a fact that this restriction does operate, in effect, to unreasonably restrain alienation or allow a perpetuity. Appellants allege that there is "slight probability that such a vote will ever be had," and that subject to such provision the Company will have the "absolute ownership, control and dominion over all of said property perpetually."

Article 1, Section 26, of the present Constitution provides, "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." This section is a re-adoption of Art. 1, Sec. 18 of each of the preceding Constitutions of the State.

Our Commission of Appeals in the recent case of West Texas Bank & Trust Co. vs. Matlock, 212 S. W. 937, in line with the usual definition has defined a perpetuity as follows:

"A perpetuity is a limitation of property, taking the subject thereof out of commerce for a longer period of time than a life or lives in being and 21 years thereafter. Words and Phrases, Vol. 6, p. 5319; Purvis vs. Sherrod, 12 Texas 140; McIlvain vs. Hockaday, 36 Texas Civ. App. 1, 81 S. W. 54. Gray on Perpetuities (3rd Ed.), p. 252, says:

" 'The tying up of property was attempted in two ways, first, by making vested estates inalienabble, and, when the judges stopped this, then by the creation of indestructible future contingent estates; and to restrain these last the rule against perpetuities was devised."

Most of the cases that arise have to do with estates that have not yet vested. There are fewer cases trying to tie up property by making vested estates inalienable, such as the instant case. Reasonable restraints on alienation, of course, may be made. It frequently becomes difficult to determine whether or not a condition is a reasonable restraint or violates the rule against perpetuities. Each case must practically stand on its own bottom.

A contract between the city of Houston and a water company, by which the city agreed not to grant to any other person the right to furnish water for fire hydrants for 25 years, with the privilege of buying the water works, but if the city did not exercise the option the contract to continue until the city would finally purchase the water works, was held to be a perpetuity in the case of Hartford Fire Insurance Co. vs. Houston, 110 S. W. 973-977; S. C. 116 S. W. 36.

It is generally held that where there is an unlawful restraint such provision will be annulled and the remainder of the instrument stand. The question is dis-

cussed at length in 21 Ruling Case Law 329, where it is stated:

> 'It has been asserted that clauses imposing unlawful restraints on alienation are seldom inseparably attached to the general testamentary plan and consequently they may be rejected and the devise remain operative in all other respects.''

The restraint on alienation put in this Decree can easily be separated from the remainder and the remainder, in so far as valid, be given effect.

(c) **The Consent Decree of 1869 was void, because prohibited by Ordinance No. 10 of the Constitution of 1866 and was not made valid by the act of the Legislature ratifying and confirming such Decree.**

(d) **The Agreement of 1905 was void under Sec. 52, Art. 3, and Sec. 3, Art. 11, of the Constitution of 1876.**

These two propositions will be considered together.

The Decree of 1869 is peculiar in that it vested in the City an undivided one-third interest in the property represented by one-third of the stock, when it was at the same time decreed that the consolidated company was a corporation. We think the purpose in putting the City's ownership and rights in the form that was adopted lies in an endeavor to escape the effect of Ordinance No. 10 appended to and made a part of the Constitution of 1866. It was evidently thought that while this ordinance precluded the City from becoming a stockholder in or lending its credit to a corporation that it did not prohibit a union of public and private funds, when owned separately, or a joint ownership of

property, and that this method of joint ownership would evade the constitutional inhibition.

When the Consent Decree of 1869 was entered, Ordinance No. 10, appended to and made part of the Constitution of 1866, read as follows:

> "Any county, city or town of this state, may become a stockholder in, or loan its credit to, any company, association or corporation; Provided, two-thirds of the qualified electors of such county, city or town, voting at an election held therein, under rules and regulations prescribed by law, assent to the same." Passed March 29, 1866.

The ordinances appended to the Constitution of 1866 were held to be a part thereof in Grigsby vs. Peak, 57 Texas 142 and Quinlan vs. Railway, 89 Texas 356-377. When the Legislature in 1870 ratified the Consent Decree of 1869, the Constitution of 1866 had been superseded by the Constitution of 1869, which did not contain a provision in respect to a city's granting aid to or owning stock in corporations.

While Appellants in their brief on pages 82 and 83 put another construction on the Compromise Decree of 1869, we submit it only covered the property between Ninth and Thirty-first Streets, including that then in litigation within this area. At the time the Compromise Decree was entered, the Wharf Company did not own the property west of Thirty-first Street. It was acquired from the Houston & Galveston Wharf & Press Co. on May 13, 1869, for 5500 shares of stock, a month and 13 days after entering the Consent Decree. (Record, p. 6). Thereafter a controversy arose, if it did not exist before, as to the City's interest in this property by reason

of its alleged ownership of the street ends, which controversy was finally settled by the Agreement of 1905 in paragraph 4, wherein it is provided that "Said Galveston Wharf Company shall admit and recognize that, by virtue of the hereinafter mentioned decree, said City of Galveston owns an undivided one-third interest in all the property of said Galveston Wharf Company situated between Thirty-first Street and Forty-first Street, including what would be the prolongations of Thirty-first and Forty-first Streets and all of intervening streets, if the same were opened, in the same manner as the City's one-third interest is now recognized and established in the property of said Galveston Wharf Company situated in said City of Galveston between Ninth and Thirty-first Streets north of Avenue A by the decree entered in the District Court of Brazoria Co., Texas, on the first day of April, 1869, etc."

Another controversy was also settled by the Agreement of 1905, viz.: whether the taxes on the two-thirds interest owned by the private stockholders should be paid out of earnings before paying dividends, the City's claim being, briefly, that to pay the taxes on the remaining two-thirds out of earnings before paying or setting apart to the City its pro rata of the earnings would be a denial to the City of the tax exemption the court held in the 63 Texas it was entitled to and would on the other hand cause the City to pay a part of the taxes of the private stockholders. The Agreement of 1905 settled this question against the City in paragraph 6. The first part of the paragraph deals with drains, after which it provides that the City shall be paid the same amount of dividends as may be paid on the other stock, "all fixed charges and legitimate expenses of operating, maintain-

ing, repairing and improving the entire property in the same manner as heretofore, including all taxes, interest and sinking funds that may be due or become due by said Wharf Company, to be first deducted before the payment of any dividends, all previous assessments and payments of taxes, interest, sinking funds and dividends being hereby admitted by said City to be correct."

The Constitution of 1876 in force when the Agreement of 1905 was made and ratified contains the following in Art. 11, Sec. 3:

> "No County, City or other Municipal Corporation shall hereafter become a subscriber to the capital of any Private Corporation or Association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed in any way to effect (affect) any obligation heretofore undertaken pursuant to law."

Art. 3 of Sec. 52 of the Constitution of 1876 contains this provision:

> "The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual or corporation whatsoever, or to become a stockholder in such corporation, association or company, provided, etc."

Sweeping effect has been given to constitutional and statutory provisions similar to those under consideration.

The Supreme Court of Idaho, in Atkinson vs. Commissioners, 28 L. R. A. (N. S. p. 412), in considering a somewhat similar constitutional provision said:

> "The court quoted with approval from the opinion in Walker vs. Cincinnati, 21 Ohio St. 54, 8 Am. Rep. 24, as follows: 'The mischief which this section in-

terdicts is a business partnership between a municipality, or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. Though joint-stock companies, corporations, and association only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person or from that of several persons associated together.' The learned judge who wrote the opinion in Wyscaver vs. Atkinson, after quoting the above extract from Walker vs. Cincinnati, added the further comment: 'And I will add that it makes no difference whether the scheme for the union of public and private money or credit originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town or township with the capital of any other person, whether corporated or unincorporated, for the purpose of promoting any enterprise whatever.' In McDonald vs. Doust, 11 Idaho, 24, 69 L. R. A. 220, 81 Pac. 63, this court said: 'Acts inconsistent with the spirit of the Constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein.' This position is reinforced by the further fact that railroad building is not, within itself, an exercise of governmental power, but is purely a business enterprise, and must be justified, if at all, under the proprietary powers of the state or political subdivision."

In Ampt vs. Cincinnati, 35 L. R. A. 736, the court in holding that a city can not unite its property with the property of a corporation, so that when united both form one property, said:

> "The serious question is whether this Sec. 8 is constitutional. Section 6 of Art. 8 of the Constitution is as follows: 'The general assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever; or to raise money for or loan its credit to, or in aid of, any such company, corporation, or association.' The full scope of this section of the Constitution has not yet been determined by this court. In Walker. vs. Cincinnati, 21 Ohio St. 15, 8 Am. Rep. 24, the court says: 'The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individauls and private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever.' In Taylor vs. Ross County Comrs., 23 Ohio St. 22, the court, on page 78, says: 'And if it should be deemed wise and economical to authorize municipalities who own waterworks, or gas works, to lease them as a means for supplying the public needs. we know of no constitutional impediment. But this is a differeent thing from investing public money in the enterprises of others, or from aiding them with money or credit. In one case, the whole proprietary interest is in the public, and its authority is paramount, while in the other, the reverse is true.' This section of the Constitution not only prohibits 'a business partnership' which carries the idea of a joint or undivided interest, but it goes further, and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality

must be the sole owner and comptroller of the property in which it invests its public funds. A union of public and private funds or credit, each in aid of the other, is forbidden by the Constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit. The whole ownership and control must be in the public. The city may lease from an individual or corporation any property of which it may need the use, or having property the use of which it does not need, it may lease the same to others; but it cannot engage in an enterprise with an individual or corporation for the construction or erection of a property which, as a completed whole, is to be owned and controlled in part by the city, and in part by an individual corporation."

See also Cleburne vs. Brown, 73 Texas 443, 11 S. W. 404; Cleburne vs. Ry. Co., 66 Texas 457.

The legislative act of 1870, purporting to ratify and confirm the Decree of 1869, was void and did not give validity to the Decree, because the City was prohibited by the Constitution of 1866 from becoming a stockholder or otherwise being interested in the Wharf Company. The following authorities rule the point that the act of the Legislature did not validate the decree. In People vs. Wisconsin Cent. R. Co., 76 N. E. 81, the court said:

"When there is no constitutional provision to the contrary, the legislature may validate by a curative act any proceeding which it might have authorized in advance, such as cases in which the power to levy taxes has failed of proper execution through the carelessness of officers or other cause; but the legislature cannot by retrospective legislation confirm what it could not originally have authorized."

In Hall et al. vs. Perry, 40 N. W. 324, the court said:

> "It is true that a retrospective statute, curing defects in legal proceedings when they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden, but the proposition that the legislature can make good that which was void when done, is utterly at variance with the fundamental principles of law." Etchison Drilling Co. vs. Dlouonoy, 59 S. 867.

In Whittock vs. Hawkins, 53 S. E. 401, the court said:

> "A curative act can only be effectual to do that which the legislature would have been competent to provide for and require to be done by a law prospective in its operation."

In Nolan Co. vs. State, 17 S. W. 829 (Texas Sup. Ct.), it is said:

> "When a contract which a Mun. Cor. has attempted to create is invalid merely for want of legislative authority to create it, it can be made valid by a subsequent law; but if, at the time of its attempted creation, the legislature could not have authorized it, it may be doubted whether the legislature could make it valid, although in the meantime, by a change in the Constitution the restriction upon its own power may have been removed."

In 12 C. J. 1091, the rule is stated as follows:

> "In general, retrospective statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the powers or authorize the acts. A statute in the form of a curative act is void, however, where it attempts to impair vested rights, or to validate or confirm what the legislature could not originally have authorized."

See the following:

Parker vs. Harris Co. Drainage Dist., 148 S. W. 361; Morris & Cummings vs. State, 62 Texas 739; Ritchie vs. Franklin Co., 22 Wall. 67, 22 L. Ed. 825; Jonesboro vs. Cairo Ry. Co., 110 U. S. 192, 28 L. Ed. 116; Blake vs. People, 109 Ill.; 12 C. J. 1091-1086-721; Peo. vs. Lynch, 51 Cal., 21 Am. Rep. 677; Peo. vs. Wis. Cen. Ry., 76 N. E. 80; Whittock vs. Hawkins (Va.), 53 S. E. 401.

Elliott on Contracts, Vol. 1, Sec. 686, says:

> "A contract which is illegal under existing laws cannot be ratified so as to give it validity after the repeal of such statute and this is true notwithstanding the party who attempts to ratify it has received a benefit under the illegal contract."

It is believed that no presumption can be indulged that an election was held, as required by the Constitution of 1866, authorizing the City to become a stockholder in the Wharf Company.

In 16 Cyc., p. 1075, note i, the rule is stated thus:

> "The presumption does not arise where the proper evidence consists of records or public documents in the custody of officers charged with their preservation and safekeeping, unless they are proved to have been lost or destroyed. Brunswick First Parish vs. McKean, 4 Me. 508."

It has been urged that Ordinance No. 10 of the Constitution of 1866 was a mere grant of authority to the cities and in no sense a limitation on the authority of the Legislature, citing in support thereof Harcourt vs. Good, 39 Texas 456, a decision by one of the reconstruction courts. When the opinion, including the one on rehearing, is read it will be observed that the court stated, "that the

authority under which that election was held is contained in Ordinance No. 10 passed by the Constitution of 1866." They then said, "that the election ordered as this was, and conducted as this, was a compliance with the ordinance, we entertain no doubt."

While the Legislature has all powers not expressly excluded from it by the Constitution, it is, nevertheless, held that where a constitutional provision provides a manner or way for doing a thing, the doctrine of expressio unius exclusio alterius has application. 12 Corpus Juris 707. We submit that this ordinance was a limitation not only on the city, but on the power of the Legislature in permitting a city to become a stockholder in or grant aid to any corporation.

But whatever view may be taken of the application of Ordinance No. 10, it seems to us that the provisions of the Constitution of 1876 do apply. The provisions of this constitution are certainly as sweeping as they could well be, and are a prohibition against the City and the Legislature. They make void the Contract of 1905 in so far as the City vested in plaintiff its rights in the property west of Thirty-first Street. The parties, by agreement, put it under the Consent Decree, in effect superseding the Contract of 1869. In these circumstances the court is not called on to attempt to separate the legal, if there be any, from the illegal provisions. The rule to be applied is stated in 13 Corpus Juris 512 as follows:

> "And where a contract contains illegal stipulations and to sustain it in part would be practically to sustain it altogether, the court will treat it as wholly void. So a contract illegal in part, and of such a nature that the good cannot be separated from the bad, is entirely void."

Even if the Decree of 1869 standing alone is valid, it is now so bound up with the Contract of 1905 that neither can be separated from the other; the former covers the property from Ninth to Thirty-first Streets and the latter from Thirty-first to Forty-first Streets. The whole property and both contracts are so commingled and united as to be inseparable. One can not be upheld without the other. The situation is very similar to cases where a mortgage and notes are taken for a consideration, a part of which is illegal and a part legal. In such cases, although the unlawful portion of the consideration is less than either of the notes, both notes and the mortgage are void; 117 Am. St. Rep. 499. See State vs Wilson, 117 Am. St. Rep. 479 and note.

(e) **The Agreement of 1905 was void under Art. 1, Sec. 17, of the Texas Constitution of 1876.**

This article provides:

> "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

This section was not in the Constitution of 1866, but, we submit, has application to the Contract of 1905. By this contract the Company was granted the special and exclusive privilege to manage, use, own and control the City's interest and rights of all kinds in the property west of Thirty-first Street, to say nothing of the other privileges given to it by that agreement. This court considered and applied this section of the Texas Constitution in the case of San Antonio vs. San Antonio Public Service Co., 65 L. Ed. 777.

In conclusion we submit that when a case arises it will be one for the state courts, subject to review by the United States Supreme Court if violence is done to the Federal Constitution. Appellees pray that the judgment of the trial court dismissing the bill be affirmed.

Respectfully submitted,

FRANK S. ANDERSON,
City Attorney.

JAMES W. WAYMAN,
Attorneys for Appellees.

McDONALD & WAYMAN,
Of Counsel.

IN THE

Supreme Court of the United

OCTOBER TERM, 1922.

No. 19

GALVESTON WHARF COMPANY,
R. J. CALDER, ET AL.,
Appellants,

vs.

CITY OF GALVESTON, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Southern District of Texas.

Citation of Additional Authorities by Appellants.

J. W. TERRY,
Solicitor for Galveston Wharf Company, R. J. Calder, Et. Al., Appellants.

TERRY, CAVIN & MILLS,
Of Counsel.

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A contract and its threatened impairment being asserted in good faith, such assertion being not merely colorable, the court had jurisdiction.

Mercantile Trust & Deposit Co. vs. City of Columbus, 203 U. S. 311.
Pacific Electric Co. vs. Los Angeles, 194 U. S. 112
Flanders vs. Coleman, 250 U. S. 223.
Illinois Central Railroad Co. vs. Adams, 180 U. S. 28.
De Rees vs. Costaguta, 254 U. S. 173.
Smith vs. Kansas City Title Co., 255 U. S. 180.

Federal questions being raised, the court had jurisdiction although it be assumed the bill was without equity.

Pacific Electric Co. vs. Los Angeles, 194 U. S. 112.
City Railway Co. vs. Citizens Street Railroad Co., 166 U. S. 557.
L. & N. Railroad vs. Western Union Telegraph Co., 234 U. S. 369.

Averment (Rec. p. 15) that City unless restrained would impair obligation of contract is sufficient for jurisdictional purposes.

Jetton vs. University of the South, 208 U. S. 489-492.
Mercantile Trust & Deposit Co vs. City of Columbus, 203 U. S. 311.
City Railway Co. vs. Citizens Street Railroad Co., 166 U. S. 557.

As invalidity of charter amendments complained of is not apparent on their face but requires extrinsic evidence to expose the same, equity will remove cloud from title.

Los Angeles City Water Co. vs. Los Angeles, 177 U. S. 558-580.
Van Wyck vs. Knevals, 106 U. S. 360-370.
Graves vs. Ashton, 215 U. S. 331.

Under special circumstances rendering such relief expedient, equity will remove cloud although facial invalidity exists. Objection of facial invalidity does not affect jurisdiction but is one of merit to be determined by Court in the exercise of jurisdiction.

Piersoll vs. Elliott, 6 Peters 98-99.
Bruce vs. Gallagher, 5 Blatchf. 487.

Where property is devoted to public use the State or city may not condemn same to devote to the same public use or to sell or lease the property.

Concurring opinion of Mr. Justice McLean in West River Bridge Co. vs. Dix, 6 Howard 537-538.

Respectfully submitted,

J. W. TERRY,
Solicitor for Galveston Wharf Company, R. J. Calder, et al, Appellants.

TERRY, CAVIN & MILLS,
Of Counsel.

GALVESTON WHARF COMPANY ET AL. *v.* CITY OF GALVESTON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 19. Argued December 7, 1922.—Decided January 2, 1923.

1. The power of eminent domain cannot be contracted away; and a contract of that kind is not within the protection of the Contract Clause of the Federal Constitution. P. 476.
2. A bill relying on the contrary hypothesis does not state a substantial federal question within the jurisdiction of the District Court. P. 476.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill for want of jurisdiction.

Mr. J. W. Terry for appellants.

Mr. Frank S. Anderson, with whom *Mr. James W. Wayman* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from a decree of the District Court dismissing a bill in equity for want of jurisdiction, on the ground that the bill states no federal question. The ground appears by the decree and also by the certificate of the Judge. Act of March 3, 1911, c. 231, (the Judicial Code), § 238, 36 Stat. 1087, 1157; amended by Act of January 28, 1915, c. 22, 38 Stat. 803, 804.

The bill alleges a contract embodied by consent in a decree of April 1, 1869, that compromised a suit brought by the city against the present plaintiff, the Galveston Wharf Company, the appellant, concerning flats in Galveston Bay. It is enough to state the general features of the arrangement. The title of the Wharf Company to certain lands was established, but it was provided that the City should become owner of one-third of the Wharf Company's stock, which was to be increased to that end, and of an undivided one-third of the Wharf Company's property, in trust for the present and future inhabitants of Galveston—all to be inalienable except by a four-fifths vote of all the qualified voters. This was confirmed by the Legislature in 1870. There was a later contract of March 9, 1905, not now material except that it again confirmed the decree of 1869, and has been performed up to the date of the bill.

But in May, 1920, the City, which is self-governing, amended its charter by giving itself power to purchase,

condemn and operate the various means and instrumentalities of public service such as gas and electric lighting plants, dock and wharf railway terminals, docks, wharves, and other things named, including the property jointly owned by the Galveston Wharf Company and the City, for the purpose of owning and operating any such public service and distributing it, with provision as to the mode of exercising eminent domain. By another amendment details were arranged in case the City should acquire the joint property by purchase or condemnation and by still another the City was authorized to compel a partition of the same property when authorized by a majority of its qualified voters, and to that end to prosecute a suit. It is alleged that the purpose of a partition would be a sale of one-third of the property upon a majority vote of the citizens, whereas the contract required a vote of four-fifths; and that a condemnation equally would impair the obligation of contracts and would deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States. The plaintiff further shows large expenditures to improve the property at its own cost and points out other property that it says can be taken more fairly if the City wishes to start municipal wharves.

Without going into greater detail we will assume that the alleged contract was made and bound the City, and that its terms will be departed from if the City should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that unless restrained the City "will attempt to partition said property or condemn the same, or both," and prays for an injunction against attempting to enforce the amendments in any manner so far as the above mentioned property is concerned. The case was heard upon the pleadings and documentary evidence but it is unnecessary to state them further since the decree went upon the ground

that the bill did not state a case within the jurisdiction of the Court.

We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant it does not show that the City will go beyond an exercise of the right of eminent domain. The allegation is, will attempt to partition or condemn. If questions can be raised about the constitutionality of the ordinance authorizing partition, the City may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. *West River Bridge Co.* v. *Dix*, 6 How. 507. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685. *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20. These cases not only dispose of the objection based upon the contract but also show the difference between an attempt to transfer property from one private person to another and the taking it for public administration by a public body. 166 U. S. 694. There is no question about the principle and therefore there is no substantial federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought.

Decree affirmed.